Office Supreme Court, U.S.
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JOHN T. FEY, Clerk

VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 195__.

No. 446

MISSISSIPPI VALLEY BARGE LINE COMPANY,

Petitioner,

versus

T. L. JAMES & CO., INC., ET AL.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

UNITED STATES OF AMERICA

UNITED STATES COURT OF APPEALS

FIFTH JUDICIAL CIRCUIT.

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Court of Appeals for the Fifth Circuit, begun on the first Monday in October, A. D., 1956, before the Honorable Joseph C. Hutcheson, Jr., Chief Judge, the Honorable Elbert P. Tuttle and the Honorable Warren L. Jones, Circuit Judges:

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

versus

T. L. JAMES & CO., INC., ET AL.,
Appellees.

BE IT REMEMBERED, That heretofore, to-wit, on the 28th day of January, A. D., 1957, a transcript of the record in the above styled cause, pursuant to an appeal from the United States District Court for the Eastern District of Louisiana, was filed in the office of the Clerk of the said United States Court of Appeals for the Fifth Circuit which said transcript was filed and docketed in said Court of Appeals in Volumes I and II as No. 16469, as follows, to-wit:-

TRANSCRIPT OF RECORD

UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT

No. 16469

MISSISSIPPI VALLEY BARGE LINE COMPANY

Appellant

versus

T. L. JAMES & CO., INC., ET AL

Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

(ORIGINAL RECORD RECEIVED)

FILED: Jan 28, 1957
EDWARD W. WADSWORTH
Clerk

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

* * * * * * * * * * * * * * * * * * * *

T. L. JAMES & CO., INC., et al

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, ETC.

No. 2901

ADMIRALTY

* * * * * * * * * * * * * * * * * * * *

A P P E A R A N C E S:

Messrs. Lemle & Kelleher
(Selim B. Lemle, Esq.)
(Charles Kohlmeyer, Jr., Esq.)

Proctors for Respondent - Appellant

Messrs. Phelps, Dunbar, Marks, Claverie & Sims
(Charles E. Dunbar, III, Esq.,)

Proctors for Libellants - Appellees

...ooOoo...

APPEAL from the District Court of the United States for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 19th day of November, 1956 at the City of New Orleans, Louisiana.

..oOo..

Extension of time granted by the Honorable United States District Court bringing the return day up to and including January 28th, 1957.

..ooOo..

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

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L I B E L

(Number and title omitted) (Filed: December 9, 1955)

The libel and complaint of T. L. James & Co., Inc., and Brown & Root, Inc., doing business under the name of Louisiana Bridge Company, and T. L. James & Co., Inc., in its individual corporate capacity, versus Mississippi Valley Barge Line Company and the M/V CHILDRESS, her engines, tackle,apparel,furniture, etc., and all persons intervening for their interests herein, in a cause of collision and cargo loss, civil and maritime, respectfully represents on information and belief:

I

At all times hereinafter mentioned, libellant, T. L. James & Co., Inc., was and still is a corporation organized and existing under and by virtue of the laws of the State of Louisiana.

II

At all times hereinafter mentioned, libellant, Brown & Root, Inc., was and still is a corporation organized and existing under and by virtue of the laws of the State of Texas.

III

At all times hereinafter mentioned, libellants, T.L. James & Co., Inc., and Brown & Root,Inc., were engaged in building the Pontchartrain Causeway in Lake Pontchartrain in the State of Louisiana, as a joint venture, and in connection with the construction of the said Pontchartrain Causeway were going business under the name of Louisiana Bridge Company. At all times hereinafter mentioned, T. L. James & Co., Inc. and Brown & Root, Inc., doing business under the name of Louisiana

Bridge Company, were the bareboat charterers and owners pro hac vice of the Barge LABELLE and libellant, T. L. James & Co., Inc., was the owner of a cargo of contractors equipment loaded on the said barge.

IV

Mississippi Valley Barge Line Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware and, at all times hereinafter mentioned, was the owner and operator of the M/V CHILDRESS.

V

The M/V CHILDRESS is a steel diesel towboat, and is now, or will be during the pendency of process hereunder, within this District and with the jurisdiction of this Honorable Court.

VI

In the beginning of December, 1954, libellant, T. L. James & Co., Inc., entered into a verbal agreement of towage or of private carriage with Mississippi Valley Barge Line Company, whereby Mississippi Valley Barge Line Company agreed to tow the Barge LABELLE, loaded with libellant, T. L. James & Co., Inc.'s contractors equipment, from New Orleans, Louisiana, to Cheatham Dam, Tennessee, for an agreed charge. The agreement was confirmed by letter by Mississippi Valley Barge Line Company, on December 8, 1954. The agreement did not mention or contemplate the inclusion of Mississippi Valley Barge Line Company's alleged Freight Tariff 25-C, I.C.C. 101 or any release from liability.

VII

On or about December 10, 1954, pursuant to said agreement, the Barge LABELLE was delivered to Mississippi Barge Line Company at New Orleans, Louisiana. The LABELLE was properly and safely loaded with the following contractors equipment, all owned by libellant, T. L. James & Co., Inc.:

1 - 54B Diesel Bucyrus Erie Dragline;

1 - 803 Diesel-Koehring Dragline Complete with one 2-1/4 cy. Hendricks drag-bucket;

1 - D8 Caterpillar tractor equipped with cable controlled Bulldozer;

1 - Ford Pickup loaded with one 200 amp. Lincoln welding machine and one cutting outfit;

1 - Ford Pickup loaded with employees' tool boxes;

1 - 8' x 10' Tool house loaded with miscellaneous rigging and rope supplies;

10 - New 5' x 26' crane mats; and,

1 - 200 amp. welding machine on skids.

VIII

The Barge LABELLE was subsequently incorporated by Mississippi Valley Barge Line Company into one of its regular tows leaving New Orleans bound up the Mississippi River. On or about December 11, 1954, while opposite the Plaquemine Locks and in tow of Mississippi Valley Barge Line Company's M/V CHILDRESS, the LABELLE was run aground or under the water or otherwise broke loose and sank. As a result of libellant's diligent salvage efforts, the Barge LABELLE, the 54B Diesel Bucyrus Erie Dragline, the 803 Diesel Koehring Dragline and the

D8 Caterpillar tractor were raised and repaired. The remainder of the equipment was a total loss.

IX

Nothing that the libellants, or anyone for whose conduct the libellants herein are responsible did or omotted to do in any way caused or contributed to the aforesaid loss or casualty, but said loss or casualty and the resulting damage was caused solely through the fault of the M/V CHILDRESS, and the fault, neglect and carelessness of those charged with and in control of the navigation of the said vessel and her tow, and the fault and negligence of the Mississippi Valley Barge Line Company employees who made up the M/V CHILDRESS' tow, in the following particulars, among others, which will be brought out upon trial:

A. The heavily laden Barge LABELLE was negligently placed at the front end of the M/V CHILDRESS' large tow;

B. The M/V CHILDRESS was unseaworthy;

C. The M/V CHILDRESS was in charge of improper and inefficient personnel, who were not attending to their duties;

D. The M/V CHILDRESS was not of sufficient horsepower to handle her tow;

E. The M/V CHILDRESS was proceeding at an excessive speed under the circumstances;

F. The M/V CHILDRESS was proceeding too close to the West bank of the Mississippi River; and

G. The M/V CHILDRESS did nothing to keep the Barge LABELLE afloat after it broke away from her tow.

The libellants reserve the right to amend this article to

amplify the acts of negligence charged when the facts surrounding the collision become fully known.

X.

In the alternative, as a second cause of action, if the M/V CHILDRESS was towing the Barge LABELLE as a common carrier and subject to Mississippi Valley Barge Line Company's Freight Tariff 25-C, I.C.C. 101, which is specifically denied, libellants show that the Barge LABELLE was delivered to Mississippi Valley Barge Line Company, properly loaded with libellants' contractors equipment and that the said barge and its equipment were not safely delivered to Cheatham Dam, Tenneesee, but on the contrary the Barge LABELLE sank and was damaged while in custody of the M/V CHILDRESS and libellant, T. L. James & Co., Inc.'s cargo was damaged and/or lost.

XI

By reason of the premises, libellants, T. L. James & Co. Inc., and Brown & Root, Inc., doing business under the name of Louisiana Bridge Company, have sustained damages in the estimated amount of SEVEN THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($7,500.00), representing the cost of salvaging and repairing the Barge LABELLE and the loss of use of the said Barge, and libellant, T. L. James & Co., Inc., has sustained damages in the estimated amount of SEVENTY-FIVE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($75,000.00), for loss, salvage, repair and loss of use of its contractors equipment.

Libellants reserve the right to amend this article to set forth their damages with particularity or to increase their

claims if further or additional damage is discovered.

XII

All and singular, the premises are true and correct and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libellant pray that:

1. Process in due form of law, acoording to the rules and practice of this Court in causes of admiralty and maritime jurisdiction, may issue against the M/V CHILDRESS, her engines, tackle, apparel, furniture, etc.;

2. Libellants may have a decree against her in the amount of their respective damages, with interest and costs;

3. The said M/V CHILDRESS may be sold under the direction of this Honorable Court and the proceeds of the sale be brought into this Court to satisfy the decree;

4. A citation, according to the course and practice of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against respondent, Mississippi Valley Barge Line Company, and that it be cited to appear and answer all and singular the matters aforesaid;

5. This Honorable Court decree that respondent, Mississippi Valley Barge Line Company, pay to libellants, the amount of their respective damages, as aforesaid, with interest and costs; and

6. Libellants may have such other orders and decrees and further relief which the justice of the case may require.

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS

BY (s) Charles E. Dunbar, III
Proctors for Libellants -

STATE OF LOUISIANA)
)
PARISH OF ORLEANS)

BEFORE ME, the undersigned authority, personally came and appeared Charles E. Dunbar, III, who, being by me duly sworn, did depose as follows:

That he is a member of the firm of Phelps, Dunbar, Marks, Claverie & Sims, proctors for libellants, T.L.James & Co.,Inc., and Brown & Root, Inc.; that Brown & Root, Inc., is a foreign corporation, incorporated under the laws of the State of Texas; and that the President and other officers are absent from the Eastern District of Louisiana; that T. L. James & Co., Inc., although a Louisiana corporation, does not maintain an office in this District and that the President and other officers are absent from the Eastern District of Louisiana, which is the reason he makes this affidavit for libellants; that he is authorized to file and prosecute this libel; that he has read the libel and all the allegations contained therein are true and correct to the best of his knowledge, information and belief; that the source of his information and the ground for his belief are an investigation conducted by his office and information furnished to him by libellants.

(s) Charles E. Dunbar, III

Subscribed and sworn to before me,

this 9 day of December, 1955.
(s) George W. Healy, III
Notary Public

PETITION OF IMPLEADER FILED UNDER 56th ADMIRALTY RULE

(Number and title omitted) (Filed: January 10, 1956)

The petition of Mississippi Valley Barge Line Company, one of the respondents herein,

-- against --

T. L. James & Co., Inc. in a cause of action, civil and maritime, respectfully represents on information and belief;

1.

At all times hereinafter mentioned, petitioner was and still is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

2.

At all times hereinafter mentioned respondent-impleaded, T. L. James & Co., Inc. was and still is a corporation organized and existing under and by virtue of the laws of the State of Louisiana.

3.

A libel has been filed against petitioner in the above styled and numbered matter by T. L. James & Co., Inc. and Brown & Root, Inc., allegedly doing business under the name of Louisiana Bridge Company and by T. L. James & Co., Inc. in its individual capacity wherein those libellants allege that by reason of the occurrences and acts of petitioner recited in the libel they have sustained damages in the estimated amount of $7500.00, representing the cost of salvaging and repairing the Barge LA BELLE and for loss of use of said Barge and that libellant, T. L. James & Co., Inc., has sustained damages in

the estimated amount of $75,000.00 for loss, salvage, repair and loss of use of certain contractor's equipment which constituted the cargo of said Barge. Petitioner has not yet filed an answer to the said libel but will answer it, denying all liability, in which denial it persists. Nevertheless, if it be decreed that petitioner is liable in any sum to T. L. James & Co., Inc. and Brown & Root, Inc., allegedly doing business under the name of Louisiana Bridge Company or to Brown & Root, Inc. then petitioner avers that it is entitled to a decree in a similar amount with interest and the costs of this proceeding against T. L. James & Co., Inc., and that accordingly it desires to implead T. L. James & Co., Inc. as a respondent-impleaded, under the 56th Admiralty Rule promulgated by the Supreme Court of the United States, for the following reasons, to-wit:

4.

At all times hereinafter mentioned petitioner was and now is certificated by the Interstate Commerce Commission as a common carrier by water for hire of freight between New Orleans, Louisiana and Cheatham Dam, Tennessee and elsewhere. As required by the Interstate Commerce Act (49 U.S.C. 1 et seq), petitioner has filed with the Interstate Commerce Commission and has printed and kept open for public inspection its schedules showing all the rates, charges and provisions for transportation between various points on its own route, including the route from New Orleans, Louisiana to Cheatham Dam, Tennessee, and all rules, regulations and conditions which

in any wise have changed, affected or determined any part or the aggregate of its rates and charges or the value of the services rendered to shippers or consignees, and posted and published the posted and published the same as required by law. Among such schedules was petitioner's Tariff 25-C, I.C.C. 101.

5.

On or about the 10th day of December, 1954, respondent-impleaded delivered to petitioner at New Orleans, Louisiana, consigned to itself at Cheatham Dam, Tennessee, pursuant to the terms, conditions and provisions of petitioner's Freight Tariff 25-C, I.C.C. 101, effective June 15, 1954, the Barge LA BELLE loaded with the contractor's equipment detailed on the copy of the straight bill of lading attached hereto, made part hereof and identified as Exhibit A. Said bill of lading was issued and delivered to respondent-impleaded in due course after petitioner had ascertained from respondent- impleaded the weights of the various pieces of contractor's equipment loaded on the Barge LA BELLE, and was accepted by respondent-impleaded.

6.

Barge LA BELLE, with its cargo of contractor's equipment detailed in the bill of lading aforesaid, was incorporated by petitioner into one of its regular tows leaving New Orleans bound up the Mississippi River. On or about December 10, 1954, when the tow had reached a point on the Mississippi River near the entrance to Plaquemines Locks, the Barge LA BELLE careened, dumped her load, and sank in about fifty feet of water.

7.

Petitioner avers that the transportation which was being performed at the time that the Barge LA BELLE sank was under what is identified as a "C" Rate in petitioner's Freight Tariff 25-C, I.C.C. 101 and was not and could not have been performed otherwise by petitioner. Petitioner pleads all of the terms and conditions governing the transportation of freight carried under "C" Rates contained in its Freight Tariff 25-C, I.C.C. 101 and without limitation more particularly the following:

Definition of "Shipper's Barge," defined in the Tariff to mean a "barge furnished by shipper, consignee or owner of the goods transported."

The pertinent part of Item 10 -

"Column 'C' Rates - apply on shipments moving in barges furnished by Customer, including only limited liability (see Items 40, 490, 500 and 510)."

The pertinent part of Item 40 -

"(b) Columns 'B' and 'C' Rates published in this Tariff are subject to the terms and conditions of Items 680, 690 and 700 of this Tariff, under which carriers assume only limited liability."

The pertinent part of Item 490 -

"(a) Customer warrants that barges not owned or supplied by Carrier, loaded with shipments which Customer offers for transportation under 'C' rates, are seaworthy and properly equipped and supplied

and in all respects fit and suitable to be towed and that the shipment is properly stowed therein or thereon. Carrier reserves the right to refuse to accept any such barge if in its judgment the barge is unfit to be towed, and Carrier's determination of unfitness shall be conclusive. Carrier shall not be obligated to inspect barges supplied by Customer or the stowage of any shipment therein or thereon and Carrier shall not be liable for failure to make such inspection; and such inspection, if made, shall not affect the warranties of the Customer as herein expressed."

Item 510 -

"When cargo is transported in barges furnished by Customer, such barges will be handled only subject and pursuant to the provisions of Item 710."

Items 680 and 700 which prescribe the printed portions of both sides of the bill of lading issued herein, a copy whereof is annexed hereto as Exhibit A and all the terms and provisions whereof are incorporated herein by reference and more particularly but without limitation Section 11, Paragraphs (a), (c) and (g) (to the extent the latter is pertinent), reading as follows:

"(a) All carriage hereunder shall be performed subject to all of the terms and provisions of, and all the exemptions from and limitation of liability contained in, the Act of Congress of the United States, approved on February 13, 1893,

and entitled 'An act relating to the navigation of vessels, etc.,' and of all other statutes of the United States according to carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith."

"(c) Except in case of negligence, carrier shall not be responsible for any loss of or damage to the shipment if it be necessary or is usual to carry the same upon deck."

"(g) No carrier or party in possession of all or any of the property herein described shall be liable for any loss of, damage to or expense in connection therewith, or delay in delivery thereof caused by * * * the act or default of shipper or owner * * *."

Item 710, which reads as follows:

"MISSISSIPPI VALLEY BARGE LINE COMPANY (hereinafter called 'Contractor') agrees to tow craft, with or without cargo laden thereon or therein (hereinafter designated as the 'tow'), upon the following terms and conditions, to-wit:

"(1) All services by Contractor shall be rendered under and pursuant to this contract.

"(2) When the tow initially starts on the voyage, the entire amount of the towage charge shall become earned and due and payble, tow

and/or cargo lost or not lost, or damaged or not damaged, in whole or in part, at any stage of the voyage.

"(3) The tow will be moved only at the convenience of Contractor, and either singly or with one or more other craft. Contractor shall have the right to shift or interchange the tow from one to another of its towing vessels as frequently as it may find it convenent so to do, or to procure towage from any other vessel not owned or operated by Contractor; to tie off the tow at any point and for any purpose; and to deviate from its route, and visit any port whether or not on said route, and in any order.

"(4) Owner warrants the tow to be seaworthy and properly equipped and supplied, and in all other respects fit and suitable to be towed, and Contractor shall not be obligated to inspect any tow and/or the stowage of any cargo therein or thereon, but such inspection if made, shall not affect the warranties of Owner as herein expressed. Contractor reserves the right, without liability therefor, to terminate the voyage and/or tie off the tow at any point should the tow become unfit to tow, and Contractor's determination of unfitness shall be conclusive.

"(5) The towage will be performed solely at the risk of the tow and its cargo, if any, including

the risk of negligence of the towing craft, and its Master, pilot, Officers and crew, and of the Contractor and its agents, servants, employees and representatives, all of whom in respect to the towage and in no other respect, shall become and be the agents and servants of the tow and its owner. Owner agrees to indemnify Contractor and any towing craft and the owners, charterers, operators and/or underwriters of such craft and hold such parties and craft harmless against all claims for any loss of or damage to or expense incurred in connection with the tow and/or its cargo, including, without limitation, claims for recoupment or by way of liability over in mutual fault collision cases wherein the towing craft will be involved, and from any liability to or on account of the crew or personnel of the tow because of any accident, damage, injury or loss of life of anyof said crew or personnel, or any loss of or damage to personal effects of said crew or personnel, howsoever arising; provided, however, that nothing herein contained shall be construed as rendering owner or the tow and/or its cargo, if any, liable for any loss of, damage to, or expense in connection with the property of Contractor or any third party or for loss of life or personal injury for which Owner or the tow and/or its cargo, if any, would not otherwise be liable.

"(6) 'Owner' means the party who procures any service hereunder, whether or not such party be the actual owner of the tow.

"(7) The delivery of the tow to the Contractor, its agents, servants or employees and/or the acceptance of any service hereunder shall constitute an acceptance by the owner of all of the terms and conditions of this contract.

"(8) Nothing herein contained shall be deemed to constitute a personal obligation of the Contractor nor to deprive the Contractor of any rights accorded to a ship owner under the Limitation of Liability Acts, as amended."

8.

Petitioner avers that the respondent-impleaded, T. L. James & Co., Inc. warranted to it that the Barge LA BELLE was seaworthy and properly equipped and supplied and in all respects fit and suitable to be towed and that the contractor's equipment loaded thereon was properly stowed. Petitioner avers that on the contrary when the flotilla in tow of the M/V CHILDRESS, in which the Barge LA BELLE was incorporated, while proceeding up the Mississippi River reached a point in the vicinity of Plaquemines Locks, the Barge LA BELLE was discovered to be sinking as a result of taking water due to inherent unseaworthiness as nothing had occurred in the handling of the said Barge which could or did result in water entering the hull of the Barge; that the Barge then required pumping but the

contractor's equipment loaded on the Barge had been so loaded that it was on top of the hatch covers, preventing their removal and making it impossible to pump the Barge.

9.

Petitioner avers that if it is liable for the sinking of the Barge LA BELLE it is entitled to reimbursement from T. L. James & Co., Inc., respondent-impleaded, for any amount which it may be condemned to pay by reason of such liability, together with interest and costs of these proceedings.

10.

All and singular the premises of this petition are true and correct and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, petitioner prays:

(1) That process in due form of law, according to the practice and rules of courts of admiralty and maritime jurisdiction and of this Court, may issue against respondent-impleaded, T. L. James & Co., Inc., citing them to appear and answer under oath this petition and the original libel herein;

(2) That this Honorable Court do dismiss the libel herein against petitioner and hold T. L. James & Co., Inc. directly liable to any libellant entitled to recover in these proceedings;

(3) That if any judgment or decree be rendered herein in favor of any libellant and against petitioner, then in that event this Honorable Court do render the same judgment and decree for the same amount with interest and costs in favor of petitioner and against T. L. James & Co., Inc.; and

(4) That the Court award petitioner its costs and grant to it such other and further relief as may be just in the premises, and the Court competent to grant.

(s) Lemle & Kelleher
Proctors for petitioner
Mississippi Valley Barge Line Co.

(s) Selim B. Lemle
(s) Charles Kohlmeyer, Jr.
Advocates

STATE OF LOUISIANA:

PARISH OF ORLEANS :

BEFORE ME, the undersigned authority, personally came and appeared SELIM B. LEMLE, who, being by me duly sworn did depose and say:

That he is a member of the law firm of Lemle & Kelleher, Proctors for Mississippi Valley Barge Line Company; that the President and other managerial officers of Mississippi Valley Barge Line Company are absent from the Eastern District of Louisiana, which is the reason why he makes this affidavit and that he is authorized so to do and to file this petition for and on behalf of Mississippi Valley Barge Line Company; that he has read all of the allegations of the petition and they are true to the best of his knowledge, information and belief; and that the source of information and ground for his belief are the statements and documents furnished to him by Mississippi Valley Barge Line Company and those secured by Lemle & Kelleher in the investigation of the sinking of the Barge LA BELLE.

(s) Selim B. Lemle

Sworn to and subscribed
before me this 6th day
of January, 1956.

(s) George B. Matthews
Notary Public

Service Accepted, all rights
reserved
Phelps, Dunbar, Marks, Claverie & Sims
by (s) Charles E. Dunbar, III.

...oOo...

ANSWER OF MISSISSIPPI VALLEY BARGE LINE COMPANY TO LIBEL AND COMPLAINT

(Number and title omitted) (Filed: January 10, 1956)

The answer of Mississippi Valley Barge Line Company, Respondent, to the libel and complaint of T. L. James & Co., Inc. and Brown & Root, Inc., allegedly doing business under the name of Louisiana Bridge Company and T. L. James & Co., Inc., individually, respectfully shows:

1.

It admits the allegations of Article I of the libel.

2.

It avers it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article II of the libel and therefore denies the same.

3.

It avers it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article III of the libel and therefore denies the same.

4.

It admits the allegations of Article IV of the libel.

5.

It admits the allegations of Article V of the libel.

6.

It denies the allegations of Article VI of the libel except to the extent that any of the allegations thereof may be admitted hereinafter in this answer.

7.

It admits that the contractor's equipment described in Article VII of the libel was loaded on the Barge LA BELLE by T. L. James & Co., Inc. and that the Barge LA BELLE with the cargo thereon was received by it at New Orleans. It denies the remaining allegations of Article VII of the libel.

8.

It admits that the Barge LA BELLE was incorporated by it into one of its regular tows leaving New Orleans bound up the Mississippi River in tow of the M/V CHILDRESS and that on or about December 11, 1954 while in the vicinity of Plaquemines Locks the Barge LA BELLE sank. It denies that the Barge LA BELLE was run aground or under the water or otherwise broke loose. It is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Article VIII of the libel and therefore denies the same.

9.

It denies the allegations of Article IX of the libel.

10.

It admits that the Mississippi Valley Barge Line Company was transporting the contractor's equipment receited in Article VII of the libel on the Barge LA BELLE in a flotilla of barges in tow of the M/V CHILDRESS subject to Mississippi Valley Barge Line Company Freight Tariff 25-C, I.C.C. 101 and that while being so transported the Barge LA BELLE sank by reason of which neither the Barge nor the equipment reached Cheatham Dam, Tennessee, but it denies the remaining allegations of Article X of the libel.

11.

It denies the allegations of Article XI of the libel.

12.

It admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court but denies that all and singular the premies of the libel are true and correct.

And now further answering the libel, respondent avers:

13.

At all times hereinafter mentioned respondent was and now is certificated by the Interstate Commerce Commission as a common carrier by water for hire of freight between New Orleans, Louisiana and Cheatham Dam, Tennessee and elsewhere. As required by the Interstate Commerce Act (49 U.S.C. 1 et seq), respondent has filed with the Interstate Commerce Commission and has printed and kept open for public inspection its schedule showing all the rates, charges and provisions for transportation between various points on its own route, including the

route from New Orleans, Louisiana to Cheatham Dam, Tennessee, and all rules, regulations and conditions which in any wise have changed, affected or determined any part or the aggregate of its rates and charges or the value of the services rendered to shippers or consignees, and posted and published the same as required by law. Among such schedules was respondent's Tariff 25-C, I.C.C. 101.

14.

On or about the 10th day of December, 1954, libellant T. L. James & Co., Inc. delivered to respondent at New Orleans, Louisiana, consigned to itself at Cheatham Dam, Tennessee, pursuant to the terms, conditions and provisions of respondent's Freight Tariff 25-C, I.C.C. 101, effective June 15, 1954, the Barge LA BELLE loaded with the contractor's equipment detailed on the copy of the straight bill of lading attached hereto, made part hereof and identified as Exhibit A. Said bill of lading was issued and delivered to libellant T. L. James & Co., Inc. in due course after respondent had ascertained from that libellant the weights of the various pieces of contractor's equipment loaded on the Barge LA BELLE, and was accepted by libellant T. L. James & Co., Inc.

15.

Barge LA BELLE, with its cargo of contractor's equipment detailed in the bill of lading aforesaid, was incorporated by respondent into one of its regular tows laaving New Orleans bound up the Mississippi River. On or about December 10, 1954, when the tow had reached a point on the Mississippi River near the

entrance to Plaquemines Locks, the Barge LA BELLE careened, dumped her load, and sank in about fifty feet of water.

16.

Respondent avers that the transportation which was being performed at the time that the Barge LA BELLE sank was under what is identified as a "C" Rate in respondent's Freight Tariff 25-C, I.C.C. 101 and was not and could not have been performed otherwise by respondent. Respondent pleads in bar of libellants' demands all of the terms and conditions governing the transportation of freight carried under "C" Rates contained in its Freight Tariff 25-C, I.C.C. 101 and without limitation more particularly the following:

Definitition of "Shipper's Barge," defined in the Tariff to mean a "barge furnished by shipper, consignee or owner of the goods transported."

The pertinent part of Item 10 -

"Column 'C' Rates - apply on shipments moving in barges furnished by Customer, including only limited liability (see Items 40, 490, 500 and 510)."

The pertinent part of Item 40 -

"(b) Columns 'B' and 'C' Rates published in This Tariff are subject to the terms and conditions of Items 680, 690 and 700 of this Tariff, under which carriers assume only limited liability."

The pertinent part of Item 490 -

"(a) Customer warrants that barges now owned or supplied by Carrier, loaded with shipments which

Customer offers for transportation under 'C' rates, are seaworthy and properly equippped and supplied and in all respects fit and suitable to be towed and that the shipment is properly stowed therein or thereon. Carrier reserves the right to refuse to accept any such barge if in its judgment the barge is unfit to be towed, and Carrier's determination of unfitness shall be conclusive. Carrier shall not be obligated to inspect barges supplied by Customer or the stowage of any shipment therein or thereon and Carrier shall not be liable for failure to make such inspection; and such inspection, if made, shall not affect the warranties of the Customer as herein expressed."

Item 510 -

"When cargo is transported in barges furnished by Customer, such barges will be handled only subject and pursuant to the provisions of Item 710."

Items 680 and 700 which prescribe the printed portions of both sides of the bill of lading issued herein, a copy whereof is annexed hereto as Exhibit A and all the terms and provisions whereof are incorporated herein by reference and more particularly but without limitation Section 11, Paragraphs (a), (c) and (g) (to the extent the latter is pertinent), reading as follows:

"(a) All carriage hereunder shall be performed subject to all of the terms and provisions

of, and all the exemptions from and limitation of liability contained in the Act of Congress of the United States, approved on February 13, 1893, and entitled 'An act relating to the navigation of vessels, etc.,' and of all other statutes of the United States according to carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith."

"(c) Except in case of negligence, carrier shall not be responsible for any loss of or damage to the shipment if it be necessary or its usual to carry the same upon deck."

"(g) No carrier or party in possession of all or any of the property herein described shall be liable for any loss of, damage to or expense in connection theewith, or delay in delivery thereof caused by * * * the act or default of shipper or owner * * *".

Item 710, which reads as follows:

"MISSISSIPPI VALLEY BARGE LINE COMPANY (hereinafter called 'Contractor') agrees to tow craft, with or without cargo laden thereon or tnerein (hereinafter designated as the 'tow'), upon the following terms and conditions, to-wit:

"(1) All services by Contractor shall be rendered under and pursuant to this contract.

"(2) When the tow initially starts on its voyage, the entire amount of the towage charge shall become earned and due and payable, tow and/or cargo lost or not lost, or damaged or not damaged, in whole or in part, at any stage of the voyage.

"(3) the tow will be moved only at the convenience of Contractor, and either singly or with one or more other craft. Contractor shall have the right to shift or interchange the tow from one to another of its towing vessels as frequently as it may find it convenient so to do, or to procure towage from any other vessel not owned or operated by Contractor; to tie off the tow at any point and for any purpose; and to deviate from its route, and visit any port whether or not on said route, and in any order,

"(4) Owner warrants the tow to be seaworthy and properly equipped and supplied, and in all other respects fit and suitable to be towed, and Contractor shall not be obligated to inspect any tow and/or the stowage of any cargo therein or thereon, but such inspection if made, shall not affect the warranties of Owner as herein expressed. Contractor reserves the right, without liability therefore, to terminate the voyage and/or tie off

the tow at any point should the tow become unfit to tow, and Contractor's determination of unfitness shall be conclusive.

"(5) The towage will be performed solely at the risk of the tow and its cargo, if any, including the risk of negligence of the towing craft, and its Master, pilot, Officers and crew, and of the Contractor and its agents, servants, employees and representatives, all of whom in respect to the towage and in no other respect, shall become and be the agents and servants of the tow and its owner. Owner agrees to indemnity Contractor and any towing craft and the owners, charterers, operators and/or underwriters of such craft and Hold such parties and craft harmless against all claims for any loss of or damage to or expense inclurred in connection with the tow and/or its cargo, including; without limitation, claims for recoupment or by way of liability over in mutual fault collision cases wherein the towing craft will be involved, and from any liability to or on account of the crew or personnel of the tow because of any accident, damage, injury or loss of life of any of said crew or personnel, or any loss of or damage to personal effects of said crew or personnel, howsoever arising; provided, however, that nothing herein contained shall be construed as rendering owner or the tow

and/or its cargo, if any, liable for any loss of, damage to, or expense in connection with the property of Contractor or any third party or for loss of life or personal injury for which Owner or the tow and/or its cargo, if any, would not otherwise be liable.

"(6) 'Owner' means the party who procures any service hereunder, whether or not such party be the actual owner of the tow.

"(7) The delivery of the tow to the Contractor, its agents, servants or employees and/or the acceptance of any service hereunder shall constitute an acceptance by the owner of all of the terms and conditions of this contract.

"(8) Nothing herein contained shall be deemed to constitute a personal obligation of the Contractor nor to deprive the Contractor of any rights accorded to a ship owner under the Limitation of Liability Acts, as amended."

17.

Respondent as a common carrier of freight for hire pleads the provisions of Section 3 of the Harter Act, and the exemption from liability therein provided.

18.

Respondent avers that the shipper, T.L.James & Co., Inc., warranted to it that the Barge LA BELLE was seaworthy and properly equipped and supplied and in all respects fit and suitable to be towed and that the contractor's equipment loaded

thereon was properly stowed. Respondent avers that on the contrary when the flotilla in tow of the M/V CHILDRESS, in which the Barge LA BELLE was incorporated, while proceeding up the Mississippi River reached a point in the vicinity of Plaquemines Locks, the Barge LA BELLE was discovered to be sinking as a result of taking water due to inherent unseaworthiness as nothing had occurred in the handling of the said Barge which could or did result in water entering the hull of the Barge; that the Barge then required pumping but the contractor's equipment loaded on the Barge had been so loaded that it was on top of the hatch covers, preventing their removal and making it impossible to pump the Barge.

19.

Respondent avers that the shipper, T. L. James & Co., Inc., breached the aforesaid warranty of seaworthiness of the Barge and proper stowage thereon of the cargo and pleads such breach of warranty, the unseaworthiness of the Barge and the improper stowage of the cargo thereon in bar of any right of recovery hereunder.

20.

All and singular the premises of this answer are true and correct.

WHEREFORE, respondent prays for dismissal of the libel at libellants' costs.

(s) Lemle & Kelleher
Proctors for respondent
Mississippi Valley Barge Line Company
(s) Selim B. Lemle
(s) Charles Kohlmerer, Jr.
Advocates

STATE OF LOUISIANA :

PARISH OF ORLEANS :

BEFORE ME, the undersigned authority, personally came and appeared SELIM B. LEMLE, who, being by me duly sworn did depose and say:

That he is a member of the law firm of Lemle & Kelleher, Proctors for Mississippi Valley Barge Line Company; that the President and other managerial officers of Mississippi Valley Barge Line Company are absent from the Eastern District of Louisiana, which is the reason why he makes this affidavit and that he is authorized so to do and to file this answer for and on behalf of Mississippi Valley Barge Line Company; that he has read all of the allegations of the answer and they are true to the best of his knowledge, information and belief; and that the source of information and ground for his belief are the statements and documents furnished to him by Mississippi Valley Barge Line Company and those secured by Lemle & Kelleher in the investigation of the sinking of the Barge LA BELLE.

(s) Selim B. Lemle

Sworn to and subscribed
before me this 6th day
of January, 1956.

(s) George B. Matthews
Notary Public

Service accepted, all rights reserved
Phelps, Dunbar, Marks, Claverie & Sims
by (s) Charles E. Dunbar, III.

...oOo...

ANSWER OF T. L. JAMES & CO., INC., TO PETITION OF IMPLEADER OF MISSISSIPPI VALLEY BARGE LINE COMPANY

(Number and title omitted) (Filed: June 4, 1956)

Now into Court comes T. L. James & Co., Inc., one of the original libellants herein, and respondent- impleaded, and for answer to the petition of impleader of Mississippi Valley Barge Line Company avers and says, as follows:

1.

The allegations of Article 1 of the petition of impleader are admitted.

2.

The allegations of Article 2 of the petition of impleader are admitted.

3.

The allegations of Article 3 of the petition of impleader are denied, except that it is admitted that a libel has been filed against petitioner in the above styled and numbered matter by T. L. James & Co., Inc. and Brown & Root, Inc., doing business under the name of Louisiana Bridge Company, and by T. L. James & Co., Inc. in its individual capacity, wherein libellants allege that by reason of the occurrences and acts of petitioner, more particularly recited in the libel, Louisiana Bridge Company has sustained damages in the estimated amount of Seven Thousand Five Hundred ($7,500.00) Dollars, representing the cost of salvaging and repairing the barge LABELLE and for loss of use of said barge, and T. L. James & Co., Inc. has sustained damages in the estimated amount of Seventy Five Thousand ($75,000.00) Dollars for loss, salvage, repair, and loss of use of certain contractor's equipment which constituted the <u>carge</u> of said barge.

4.

For lack of information sufficient to justify a belief, the allegations of Article 4 of the petition of impleader are denied.

5.

It is admitted that T. L. James & Co., Inc. delivered to petitioner at New Orleans, Louisiana, the barge LABELLE loaded with contractor's equipment to be towed to Cheatham Dam, Tennessee. It is admitted that a bill of lading was issued and delivered to T. L. James & Co., Inc., but negotiations with the petitioner for the movement of the equipment were verbal and the said bill of lading was received subsequent to the time respondent-impleaded contractor's equipment was lost in the Mississippi River from the barge LABELLE on December 11, 1954. For lack of information to justify a belief, the remaining allegations of Article 5 of the petition of impleader are denied.

6.

It is admitted that on or about the 10th day of December, 1954, the barge LABELLE, with its cargo of contractor's equipment, was incorporated by petitioner into one of its regular tows leaving New Orleans bound up the Mississippi River, and that the barge LABELLE later sank in the Mississippi River opposite the Plaquemine Locks and the defendants' contractor's equipment was lost. For lack of information sufficient to justify a belief, the remaining allegations of Article 6 of the petition of impleader are denied.

7.

The allegations of Article 7 of the petition of impleader are denied.

8.

The allegations of Article 8 of the petition of impleader are denied.

9.

The allegations of Article 9 of the petition of impleader are denied.

10.

The allegations of Article 10 of the petition of impleader are denied, except that it is admitted that the premises are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

11.

AND NOW, further answering, T. L. James & Co., Inc., original libellant and respondent-impleaded herein, shows the true facts are as follows:

12.

In the beginning of December, 1954, the respondent-impleaded entered into a verbal agreement of towage or of private carriage with the petitioner whereby the petitioner agreed to tow the barge LABELLE loaded with respondent-impleaded's contractors equipment from New Orleans, Louisiana, to Cheatham Dam, Tennessee, for an agreed charge. The agreement was confirmed by letter by petitioner on December 8, 1954. The agreement did not mention or contemplate the inclusion of petitioner's

alleged Freight Tariff 25-C, I.C.C. 101, or any release from liability.

13.

On or about December 10, 1954, pursuant to said agreement the respondent-impleaded delivered the barge LABELLE to the petitioner at New Orleans, Louisiana, The LABELLE was properly and safely loaded with the following contractors equipment:

1 - 54B Diesel Bucyrus Erie Dragline;

1 - 803 Diesel Koehring Dragline complete with one 2 - 1/4 Cy. Hendricks drag-bucket;

1 - D8 Caterpillar tractor equipped with cable controlled Bulldozer;

1 - Ford Pickup loaded with one 200 amp. Lincoln welding machine and one cutting outfit;

1 - Ford Pickup loaded with employees' tool boxes;

1 - 8' x 10' Tool house loaded with miscellaneous rigging and rope supplies;

10 - New 5' x 26' crane mats; and

1 - 200 amp. welding machine on skids.

14.

The barge LABELLE was subsequently incorporated by the petitioner into one of its regular tows leaving New Orleans bound up the Mississippi River. On or about December 11, 1954, while opposite the Plaquemine Locks and in tow of the petitioner's M/V CHILDRESS, the LABELLE was run aground or under the water or otherwise broke loose and sank. As a result of respondent-impleaded's diligent salvage efforts the 54B Diesel

Bucyrus Erie Dragline, the 803 Diesel Koehring Dragline and the D8 Caterpillar tractor were raised and repaired. The remainder of the qquipment was a total loss.

15.

Nothing that the respondent-impleaded, or anyone for whose conduct the respondent-impleaded herein is responsible, did or omit ed to do in any way caused or contributed to the aforesaid loss or casualty, but said loss or casualty and the resulting damage was caused solely through the fault of the M/V CHILDRESS, and the fault, neglect and carelessness of those charged with and in control of the navigation of the said vessel and her tow, and the fault and negligence of petitioner's employees who made up the M/V CHILDRESS' tow, in the following particulars, among others, which will be brought out upon trial:

A. The heavily laden barge LABELLE was negligently placed at the front end of the M/V CHILDRESS' large tow;

B. The M/V CHILDRESS was unseaworthy;

C. The M/V CHILDRESS was in charge of improper and in efficient personnel, who were not attending to their duties;

D. The M/V CHILDRESS was not of sufficient horsepower to handle her tow;

E. The M/V CHILDRESS was proceeding at an excessive speed under the circumstances;

F. The M/V CHILDRESS was proceeding too close to the West bank of the Mississippi River; and,

G. The M/V CHILDRESS did nothing to keep the barge LABELLE afloat after it broke away from her tow.

The respondent-impleaded reserves the right to amend this article to amplify the acts of negligence charged when the facts surrounding the collision become fully known.

16.

Respondent-impleaded further avers that if the M/V CHILDRESS was towing the barge LABELLE as a common carrier and subject to petitioner's Freight Tariff 25-C, I.C.C. 101, which is specifically denied, respondent-impleaded shows that the barge LABELLE was delivered to petitioner properly loaded with respondent-impleaded's contractors equipment and that the said barge and its equipment were not safely delivered to Cheatham Dam, Tennessee but, on the contrary, the barge LABELLE sank while in the custody of petitioner's M/V CHILDRESS and respondent-impleaded's cargo was lost.

W H E R E F O R E, T. L. James & Co., Inc. prays that this, its answer, be deemed good and sufficient, and after due proceedings had, there be a decree in favor of original libellants herein in the amount of their respective damages and that there be a decree in favor of T.L. James & Co., Inc. dismissing the petition of impleader of Mississippi Valley Barge Line Company, at its costs.

Original libellant and respondent-impleaded herein, T.L. James & Co., Inc., further prays for such other orders and decrees that may be just and this Court competent to grant.

PHELPS,DUNBAR,MARKS, CLAVERIE & SIMS

S/ BY: Charles E.Dunbar, III
Attorneys for T.L. James & Co., Inc.
Tenth Floor, United Fruit Building
New Orleans, 12, Louisiana

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, a Notary Public in and for the aforesaid Parish and State, personally came and appeared: CHARLES E. DUNBAR, III who, after being duly sworn, did depose and state:

That he is a partner of Phelps, Dunbar, Marks, Claverie & Sims, proctors for T. L. James & Co., Inc.; that he signs this affidavit for the reason that T.L. James & Co., Inc. has no officer within the jurisdiction of this Honorable Court; that he has read the foregoing Answer and that all of the facts, allegations, denials [redacted] fact therein contained are true and correct, except those made on information and belief, and as to those, he believes them to be true and correct; that the source of his information and the ground for his belief is an investigation conducted by his office and other information forwarded him by respondent-impleaded.

s/ Charles E. Dunbar, III
Charles E. Dunbar, III

Sworn to and subscribed before me,

this 1st day of June, 1956.

s/ Blake West.
Notary Public

...ooOoo...

P R O C E E D I N G S

(Number and title omitted) (Filed: June 20, 1956)

Testimony taken at the trial on the 4th and 5th of June, 1956, in the Courtroom, U. S. Post Office Building, New Orleans, Louisiana: THE HONORABLE J. SKELLY WRIGHT District Judge, presiding.

A P P E A R A N C E S:

Charles E. Dunbar, III, Esq.,
John W. Sims, Esq.,
Attorneys for Libellant

Charles Kohlmeyer, Jr., Esq.,
Selim B. Lemle, Esq.,
Attorneys for Respondent

MORNING SESSION

(Monday, June 4th, 1956.)

THE COURT:

In Civil Action 4320, and 2901 Admiralty, are all the parties ready?

MR. KOHLMEYER:

We are ready.

MR. DUNBAR:

We are ready.

THE COURT:

You may procced.

MR. DUNBAR:

Your Honor, we would like the witnesses separated, but we would like permission to keep one company representative and an expert witness at our table.

THE COURT:

What is Counsel's position?

MR. KOHLMEYER:

We have factual witnesses, if the Court please, and we have also witnesses on the question of the issuance of the bill of lading, and I think that if the factual witnesses are separated, that will be enough, will it not?

MR. DUNBAR:

We are going to call witnesses this morning that are going to principally testify in connection with the contract arrangement.

MR. KOHLMEYER:

That's right.

THE COURT:

Give the Crier the name of your witnesses.

(Fifteen witnesses called.)

THE COURT:

Which of these witnesses do you wish to leave in the Courtroom?

MR. DUNBAR:

I would like to have Mr. Northon, our expert witness, and Mr. Sanders, the company representative.

THE COURT:

What witnesses does counsel for Mississippi Valley Barge Line want to remain in the Courtroom?

MR. KOHLMEYER:

Do I understand that the expert witnesses may stay in? Captain Sarbeck will be an expert for us, and Mr. Grant will

probably also testify, if the Court please. Mr. Grant is not here yet. Now, as the company representative, I don't think that we need anyone.

THE COURT:

Will you call those witnesses that you want in Court again, please.

MR. DUNBAR:

That would be Mr. Northon and Mr. Sanders, and if they will sit over here.

THE COURT:

Now, Mr. Kohlmeyer, will you call your witnesses that you want in Court.

MR. KOHLMEYER:

I want Captain Sarbeck, and he will be an expert, and also Captain Powell, who is the Master of the ship, and, if the Court please, as the company representative, I think we would like to have him.

THE COURT:

I do believe that if we want to separate these witnesses we ought to do it in fact as well as in name. If that Captain is a very important factural witness, I think he ought to be separated. If you have a very important factual witness that you want to keep in the Courtroom, I think that he ought to be separated. In other words, we couldn't have it two ways; they are either going to be separated or not separated.

MR. DUNBAR:

We don't have any factual witnesses in the sense of our

witnesses, I mean in regard to --

THE COURT:

I think it is just as important in connection with the telephone conversations, and so on, with reference to factual witnesses, so I think that we ought to have the witnesses separated or not separated.

MR. DUNBAR:

Of course, Mr. Sanders will only testify concerning the loading of the barge, but we are willing to have him separated if Captain Powell is going to be separated.

THE COURT:

What is Counsel's position?

MR. KOHLMEYER:

That is agreeable.

THE COURT:

We will separate Mr. Sanders and the Captain as well.

MR. KOHLMEYER:

Then, there is the other Master, but he is an expert only and he knows nothing of the facts.

THE COURT:

He can sit in the Courtroom.

Gentlemen: You are instructed not to discuss this case with anyone, and particularly among yourselves. The only exception to this instruction is that you may discuss the case with Counsel for either side, irrespective of which side may have subpoenaed you. You have a right, and you should discuss the case with any Counsel in the case who may wish to discuss it with you. Counsel are seated at the table before you in the

Courtroom.

You will be sworn as you take the witness stand. You will now go into the witness room.

MR. DUNBAR:

I would now like to call Mr. J. E. Walters.

J. E. WALTERS

called as a witness at the instance of the Libellant, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DUNBAR:

Q Sir, would you please state your name?

A. J. E. Walters.

Q What is your permanent address?

A Covington, Louisiana.

MR. KOHLMEYER:

We have three witnesses with offices in the city. We won't use them until 2:00 o'clock, and may I excuse them until 2:00 o'clock?

THE COURT:

Yes.

BY MR. DUNBAR:

Q How old are you, sir?

A Fifty-seven.

Q By whom, and in what capacity are you presently employed?

A I am employed by the Louisiana Bridge Company, as Project Manager. The Louisiana Bridge Company is a joint venture between Brown & Root of Houston, and T. L. James & Company of Ruston,

Louisiana.

Q What previous experience have you had in the contracting business?

A I have been actively engaged in heavy construction work since 1920.

Q With what companies, sir?

A H. H. Hall Construction Company, East St. Louis, Missouri, from 1921 to 1924; Joseph Hemhurst & Son, Inc., New Orleans, from 1924 to 1927; Stevens Brothers; and Miller Hudson Company, New Orleans, Louisiana, from 1927 to 1934; The Tennessee Valley Authority, 1934 to 1940; Brown & Root, Inc., of Houston, Texas, from 1940 to 1948; and I was self-employed from 1948 to 1954, running my own company, and operating as a joint venture with T. L. James & Company, Ruston, Louisiana. In May of 1954 I was associated as Project Manager of the Louisiana Bridge Company by the T. L. James and Brown & Root Company to handle the construction of the Lake Pontchartrain Causeway.

Q Do you know whether or not the Louisiana Bridge Company is qualified to do business under that name in Louisiana?

A It is.

Q Sir, did you have occasion in the early part of December, 1954, in your capacity with the Louisiana Bridge Company, or in any other capacity, to charter certain barges?

A I did.

Q What were the names of those barges?

A I chartered the La Belle, and Barges Numbers 1, 2, &

3 from the McDonough Construction Company, in early December of 1954..

Q In what capacity did you charter those barges?

A It was a verbal charter.

Q For whom were you acting?

A I was representing the Louisiana Bridge Company. Actually, the transaction was handled in the name of the T. L. James Company, who was one of the joint ventures that make up Louisiana Bridge Company.

Q Would you explain the nature of your negotiations with McDonough Construction Company?

MR. KOHLMEYER:

If the Court please, we object to the question if this is a verbal charter. If it is a written charter, then we would submit that the written charter should be produced in Court, and that would be the best evidence of its terms --

MR. DUNBAR:

I have asked the witness to explain the nature of the negotiations, and I think the question can be answered.

THE COURT:

Do you have a written charter?

THE WITNESS:

We have a letter agreement prepared after the negotiations were completed.

THE COURT:

Suppose you produce the letter of agreement.

THE WITNESS:

I don't have it with me. I was not asked to bring it. I can produce it by having the office forward it in here.

BY MR. DUNBAR:

Q Sir, what was your first contact with McDonough Construction Company?

MR. KOHLMEYER:

I make the same objection, if the Court please.

THE COURT:

I sustain the objection. He said it was a letter of agreement, and we ought to have the letter of agreement, unless you are suggesting that you are going to use parol to change the letter of agreement. We ought to, at least, see the letter of agreement first, and determine whether or not it composes a contract between the parties.

BY MR. DUNBAR:

Q Mr. Walters, is there a letter agreement outlined in the contract between the parties?

A There is a letter agreement providing for the rental of the four barges, verbal charter, between McDonough Construction Company, and I am not positive whether it is between them and Louisiana Bridge Company, or whether it is between Brown & Root, or T. L. James and McDonough, but it has all been taken over by the Louisiana Bridge Company representing the two firms.

Q In whose possession is that letter of agreement?

A In our files at Mandeville, Louisiana, at the Louisiana Bridge Company.

MR. DUNBAR:

We will make arrangements to produce the letter, if the

Court please.

BY MR. DUNBAR:

Q When did the Barge La Belle first go on hire?

A December 2nd, 1954.

Q When was the barge actually picked up or put in use?

A The barge was picked up December 3rd or 4th, and moved by the Towboat Nile to Krotz Springs for loading certain equipment.

Q Where was that equipment to be transported?

A The equipment was to be moved from Krotz Springs to Cheatham Locks, near Ashland City, Tennessee.

Q Was there any reason why the La Belle was rented, rather than one of the other --

A It was recommended by Mr. McDonough, as being more suited for that particular job.

Q In what respect, sir?

A He felt it was --

MR. KOHLMEYER:

We object to that as hearsay.

THE COURT:

I sustain the objection.

BY MR. DUNBAR:

Q From Krotz Springs where was the LaBelle delivered?

A The La Belle was moved from Krotz Springs, following loading, to the docks in New Orleans, the McDonough Docks, where it was later turned over to the Mississippi Valley Barge Line for transportation to Ashland City, Tennessee.

Q What day did the Nile pick up the La Belle?

A The afternoon of the 5th of December. I beg your pardon, it was the afternoon of the 6th. It was Monday, and if I may, I will verify that by looking at my notes. (Viewing document). Yes, it was picked up the afternoon of the 6th of December, 1954, and moved by the Towboat Nile to New Orleans that afternoon and night, and was delivered the following day to New Orleans.

Q Were you present when the barge was loaded?

A I was present at the time the barge arrived at Krotz Springs, and was there until the first heavy crane was placed on board.

Q When did the loading operations commence?

A They commenced the early morning of December 6th, about 7:00 o'clock.

Q Sir, what inspections, if any, were made of the barge when it arrived?

A Mr. Sanders, my Supervisor, and myself, made a complete inspection of all of the holds to determine whether the barge seemed suitable for the purpose intended.

Q How did you inspect the holds?

A We removed the hatch covers and made visual inspection--we looked into some, and in some we looked down to verify that the framing was all in good order, and that the barge was in good shape and dry.

Q Did you find water in any of the holds?

A No, sir. I say no water, but then there may have been spots, you know, as there is in all barges, but the barge was

what I would consider completely dry.

Q How many holds or compartments did the barge have?

A Fourteen or fifteen, to the best of my knowledge, best of my memory.

Q Did you go into every hold?

A We either went into them or looked into them with a flashlight to verify the framing.

Q What type of barge was the La Belle?

A The La Belle was a converted ferry barge that had been used for originally, for ferry service, as far as I know, and a barge that McDonough Construction Company had been using for several months prior to our acquiring it, as a barge for dredge work, crane work, and off of the deck.

Q Do you know the dimensions of the barge?

A It was approximately 35 feet wide by 150 feet long, by 5½ feet deep.

Q Sir, had you had any previous experience loading barges with contractors' equipment?

A I would say for 20 years I have been around marine operations, and loading operations where we were transferring contractors' equipment by barge, and other methods.

Q On the basis of your previous experience, and considering the condition of the barge, did you consider it fit for the intended use?

A I did.

Q Can you explain in your own words exactly how the barge was loaded, or the loading that occurred before you left?

A We had prepared a ramp on the bank of the Atchafalaya River the Saturday and Sunday preceding the loading, to walk the crane and tractors down, and placed on board. We had the ramp complete, and had heavy mats installed on the lower portion of it where it was wet, in preparation for a loading. On the morning of the 6th, when the barge arrived, we had the Nile push it in bow first to the bank, and we had two tractors available there that were not going to be loaded. We attached a steel cable to each corner, and pulled it lightly against the bank there, and let the tractors hold it so that it would not move as the equipment was loaded.

Following this, the first crane, we picked up additional mats, placed on the front of the barge and on the bank, tying the barge to the ramp so that it would not move, and the first crane, which was a 54-B Diesel Bucyrus, was then walked on it, and walked across the deck of the barge to the stern end of it, using the mats, just transferring them around him so as to use the mats to walk across the deck of the barge, until he got to his final location on the stern end.

Q During the course of loading operations, in what position, in relation to the bank, was the Barge La Belle itself?

A It was perpendicular to the bank, with the bow shoved into the loose dirt at the bank.

Q Was it in that position at all times?

A That is right, it remained that way until completely loaded.

Q Do you know exactly what equipment was loaded aboard the barge?

A The barge had a 54-B Bucyrus Erie; an 803 Koehring; a D-8 Tractor; two Ford Pickups; a toolhouse with miscellaneous rigs and supplies in it; an extra drag bucket for the 803 Koehring. It also had ten new mats that had been purchased for this particular job, that were resting on the barge deck for the 803 Koehring, and the 54-B to rest on.

I believe that is a complete list. I may have missed one or two small items, but I don't believe so.

Q Sir, I show you a letter which purports to be a letter that you wrote to the National Surety Company, or rather, it is a photostatic copy of a letter you purportedly wrote the National Surety Company, and ask you if you can read or identify it? (Document to witness.)

A That is correct. It is a letter I wrote from Houston following the movement of the equipment, to the National Surety Company.

Q And the letter reflects the cargo loaded on the barge?

A That reflects the cargo loaded on it, and it is my signature on it.

Q Sir, could you tell us which of the equipment was actually ultimately lost, if you know, and which equipment was damaged?

A The entire cargo was dumped. The 54-B was recovered; the 803 Crane, and the D-8 Tractor, and one Ford Truck, and I believe that was all.

Q Who owned the cargo?

A The T. L. James Company.

Q I am going to mark the letter for identification Walters-1, and offer it, introduce, and offer it in evidence in

connection with the testimony of this witness.

(Whereupon, the document above referred to, marked Walters-1 for identification, was received in evidence.)

BY MR. DUNBAR:

Q Sir, do you know the total tonnage of the equipment which was loaded on that barge?

A Approximately 200 tons.

Q Was the barge loaded to capacity?

A It was not. The dimensions of the barge would indicate that it would support approximately 125 tons per foot of depth, and the load on it, I would say, put it down less than 2 feet.

Q What arrangements did you make to have the barge moved from New Orleans to Tennessee?

A I had contacted Mississippi Valley Barge Line from Houston, requesting them to give me a price for the movement of the barge from New Orleans to Ashland City, or Cheatham Locks, Tennessee, and the arrangements were completed between Mr. Thompson and myself, by his telegram and telephone conversations to me at the Roosevelt Hotel, in New Orleans, where I happened to be at the time that the information was available, and I had confirmed by telephone that we would look to the to move the equipment, and had sent a telegram confirming it.

Q Sir, was there any written contract?

A There was not.

Q In what capacity were you acting when you dealt with Mr. Thompson?

A The same capacity as I am now, as Project Manager,

Louisiana Bridge. However, this transaction was handled in the name of T. L. James & Company, and I was acting as their agent, because the movement was actually to move the equipment owned by them, and they, being a joint venture, I was acting as their agent, but as Project Manager of Louisiana Bridge Company, who eventually picked up the entire expense of the movement of the barge, and the cargo that it went to Tennessee to get.

Q When were these preliminary negotiations with Mr. Thompson conducted in Houston?

A I don't remember the exact date. It was, I would say, between the 25th of November and 1st of December, as the week prior to that--actually, his telephone conversation and telegram to me was dated December 8th, which I received, as I stated a little while ago, at the Roosevelt Hotel in New Orleans.

Q Specifically what was discussed in your preliminary negotiations with Mr. Thompson?

A There was nothing in particular discussed. I described the cargo and asked for a price on it. We had a minimum cargo rate for 300 tons, so I was not particularly concerned over the tonnage on it because I knew that we would fall within that limit, and our only conversation was concerning Mississippi Valley Barge Line picking up the barge in New Orleans, transporting it to Ashland City, Tennessee, for and having an agreed price per ton, which actually was based on the 300 ton load, which we did not have on the barge.

Q Sir, I show you a co[illegible] f a letter which is addressed to you, and purportedly written by Mr. F. E. Thompson, and ask you if you can identify it? (Document to witness.)

A That is the letter that he forwarded to me, the same day, apparently, dated the same day that our telephone conversation was, when he was in Houston and I was in New Orleans. The only discrepancy that I see here, they state T. L. Jones Company, when actually it is T. L. James Company.

Q When you say "discrepancy". you mean a discrepancy in the copy?

A No, the copy is correct, but the name is improperly used there.

Q Except for the negotiations that you had with Mr. Thompson in Houston, and the information incorporated in this letter, was there any additional discussions or correspondence?

A No, that was the entire transaction. It was based on our need for the movement of a barge there, giving us a price to do it, and our acceptance of their offer.

MR. DUNBAR:

I am going to ask that the copy of the letter be marked Walters-2, and I introduce and file it in evidence in connection with the testimony of this witness.

(Whereupon, the document above referred to, makred Walters-2 for identification, was received in evidence.)

BY MR. DUNBAR:

Q Sir, I am going to show you a photostatic copy of a telegram addressed to you at the Roosevelt Hotel, purportedly

signed by Mr. F. E. Thompson, and ask you if you can recognize it? (Document to witness.)

A Yes, I recognize that. That was the copy of a telegram I received at the Roosevelt Hotel following our telephone conversation of the same date.

Q Was the telegram received before or after the letter?

A The telegram was received before the letter. This was delivered to me at the hotel. The letter was delivered to me at my office in Houston, at a later date.

MR. DUNBAR:

I am going to ask that the telegram be marked for identification Walters-3, and I would like to offer, introduce, and file it in evidence in connection with this witness' testimony, Mr. Walters.

(Whereupon, the document above referred to, marked Walters-3 for identification, was received in evidence.)

BY MR. DUNBAR:

Q Mr. Walters, what previous dealings, if any, have you had with the Mississippi Valley Barge Lines?

A I can't say positively I have ever had any. I think that years ago I had a transaction with them in Tennessee, but I am not sure whether it was Mississippi Valley or not that we dealt with.

Q Have you had any other dealings that you can recall?

A No, that is the only time that I can remember that we had movements of equipment by barge.

Q Do you remember any of the terms or conditions of the contract for the movement of those earlier barges?

A No, I don't. That was in 1950.

Q How long ago was that, sir?

A That was in 1950.

Q Do you know whether or not T. L. James has had any previous dealings with Valley?

A I cannot answer for them. To my knowledge they have not, but their operations are broad, and they could well have had dealings with them, but to my knowledge they have not had any, and it was not at their suggestion that I made these arrangements with Mississippi Valley.

Q During the course of your verbal negotiations with Mr. Thompson do you remember whether or not Mr. Thompson mentioned the source of the rate he was quoting you?

A No, I don't remember that was ever brought out.

Q What mention, if any, was made of the fact that Mississippi Valley is certificated as a common carrier by the Interstate Commerce Commission or Valley's Freight Tariff?

A To my knowledge nothing was mentioned of it. I have no recollection of it.

Q Are you familiar with that Tariff?

A I recently have had occasion to see something about it, but that is the first experience I really had to realize how much was in it.

Q When you say "recently", when did you first --

A When you were showing them to me in your office about a week ago.

Q During the course of your verbal negotiations with Mr. Thompson, what mention, if any, was made of the release from

liability agreement in Valley's standard towing contract?

A To the best of my knowledge it was never mentioned.

Q Mr. Walters, do you know what the Harter Act is?

A No, I don't.

Q Was the Harter Act mentioned?

A I don't think it was. I hate to make a positive statement of an incident two or three years ago, because it would have been meaningless to me.

Q Do you remember whether or not Mr. Thompson mentioned that freight would be earned at the time the La Belle was taken in tow?

A I am rather positive that was never mentioned. I have no recollection it was.

Q Did you contemplate that a bill of lading would be issued?

A I assumed that something would be required. Although the fact that our cargo was less than the minimum rate, it had little significance to me, because I knew that the 300 tons was more than ample to cover the proposed movement of equipment.

Q Was a bill of lading, in fact, received?

A It was forwarded to me several weeks after the cargo was lost.

Q When was the first time that you knew that the La Belle and her cargo had encountered difficulty?

A I received a telegram, I believe it was the morning of the 11th, and I am not-- I don't believe I should say I received a telegram--I am not sure whether Mr. Thompson called me, or whether I received the telegram. I don't remember that.

If I did receive a telegram, it would have been turned over to the National Surety Company, the insurers, but I am not sure whether I received a telegram, or whether I was notified by telephone by Mr. Thompson, but it was on the day of the sinking.

Q Do you have any personal knowledge of what efforts were made to salvage the equipment?

A The salvage negotiations were handled by T. L. James' office in Kenner, Louisiana. I was advised of the negotiations, and the insurance company, of course, advised me that they were taking bids for the salvage, but I did not actively enter into the phase of it, because the insurance was carried in the name of T. L. James Company on the equipment, and it was more convenient to New Orleans for them to handle it as I was working out of Houston, and the Kenner office of T. L. James handled that phase of it.

MR. DUNBAR:

That is all I have.

Will you please answer Mr. Lemle's and Mr. Kohlmeyer's questions.

CROSS EXAMINATION

BY MR. KOHLMEYER:

Q Mr. Walters, I think you said Louisiana Bridge Company was qualified in Louisiana?

A Both firms that are joint ventures, T. L. James, and Brown & Root, are qualified, and because of that Louisiana Bridge Company is automatically qualified to do business in Louisiana.

Q What is Louisiana Bridge Company?

A It is an assumed name of the joint venture that is used for handling this particular job.

Q Who owned the equipment that was on the La Belle?

A That belonged to T. L. James Company, one of the joint ventures in the Causeway project.

Q In whose name was the insurance carried?

MR. DUNBAR:

I object to that question as being irrelevant.

MR. KOHLMEYER:

If the Court please, we have had testimony on direct examination about the insurance, and I think the door has been opened, and that we have a right to know.

THE COURT:

I overrule the objection. There is something in the record which indicates that insurance was carried.

THE WITNESS:

The insurance on the equipment was carried in the name of T. L. James Company.

BY MR. KOHLMEYER:

Q What sort of insurance was that?

MR. DUNBAR:

I object to that also, your Honor.

THE COURT:

On what basis?

MR. DUNBAR:

The question was--

THE COURT:

I heard the question, but what is the objection?

MR. DUNBAR:

On the ground of relevancy, if your Honor please.

THE COURT:

What is the purpose of the question?

MR.KOHLMEYER:

If the Court please, he might have that insurance--I don't know, but that insurance is before the Court, and I think we have a right to examine the witness on what sort of insurance it was, for whose account, and if we have a benefit of it, then the claim, of course, should be dismissed. I think it is very relevant to know what sort of insurance it was, the terms and conditions of the policy, and everything else.

THE COURT:

I overrule the objection.

Answer the question, Mr. Walters.

THE WITNESS:

To the best of my knowledge,the policy is in the name of T. L. James Company. It is a broad policy that covers all of T. L. James' Company's equipment, including the risk from arine transportation.

BY MR.KOHLMEYER:

Q Was there a special policy written on this particular job?

A There was not.

Q So this is the overall policy of T. L. James?

A Overall policy of T. L. James Company covering all of

their equipment.

Q Where is that policy presently, Mr. Walters?

A I imagine it is in Ruston, Louisiana, the headquarters of T.L. James Company.

Q Mr. Walters, when you first talked to Mr. Thompson about this movement, exactly what was your conversation? Could you tell us that?

A Mr. Thompson was suggested to me, and in fact, I think the first negotiations with Mr. Thompson were made by Coyle Lines. Coyle Lines were the company that were going to move the barge from New Orleans, the empty barge from New Orleans to Krotz Springs and return it to New Orleans, and I think that Coyle's representatives in Houston--I don't remember his name--had suggested that Mississippi Valley ran up and down the river regularly, and had suggested to Mr. Thompson to call me to make the arrangements. That is the best of my recollection.

Q You knew that Mississippi Valley was one of the big carriers on the river?

A I know that Mississippi Valley, as well as several others, were carriers that normally operated in the Mississippi River.

Q You know generally who can tow, and who can't tow, and who can transport and who can't transport on the river, Mr. Walters?

A No, frankly I don't know that. I know that Mississippi Valley is one of the firms that normally does operate up the river.

Q You know that the Interstate Commerce Commission regulates transportation by water in the inland waters?

A Generally I knew that there is some regulation, but I am not familiar with it.

Q You know generally also that you have to be a certificated carrier in order to carry commodities of other people on the inland waters?

A I wouldn't say that that is exactly true. I am not familiar with that because I have not used them, but I knew generally that there were operators in the river, and have never had occasion to become familiar with it.

Q When you talked to Mr. Thompson did he quote a rate applicable on this shipment as soon as you asked him for it, or did he say something that would indicate he was going to check the rates?

A He said he would have to check with his New Orleans office to get the rate, that it would be handled from here, and I frankly can't say whether that time that elapsed was two days, or more or less, but I do remember that he said he would have to check with New Orleans to get the rate, and he would advise me, and I advised him my location, and it developed that he forwarded the information to me at the Roosevelt Hotel.

Q How many conversations did you have with Mr. Thompson?

A I think I had two at Houston, prior to the telegram that you see there, and one over there, and one from New Orleans to Houston about it, with the confirmation by telegram.

Q Did he give you various rates with various minima?

A His rate, as well as I remember, is all stated in the telegram that has been submitted here. He gave a rate per ton, based on a 300 ton minimum.

Q Did he say anything about your having to insure your own merchandise?

A To the best of my knowledge it was never mentioned.

Q Did he say anything about a bill of lading which would be issued?

A I wouldn't say positively whether he did or not, frankly. It is a detail that he could have mentioned. I don't recall it.

Q At the time that you first talked to him, did you tell him that you were going to have the equipment loaded on your own barge?

A That is right.

Q After you got the telegram of December 8th from Mr. Thompson, did you send any reply, do you recall?

A I am quite positive that I wired him from the Roosevelt Hotel at New Orleans confirming our telephone conversation of that date.

Q I show you here what purports to be a copy of a telegram marked Valley-4, purportedly sent to Mississippi Valley, Attention Thompson, at Houston, and signed by you, dated December 8th, at 11:12 P.M. I think, and ask you if you remember sending that telegram? (Document to witness.)

A That is correct. I was quite sure I had sent the wire confirming the transaction, but that was all.

Q Do you recall whether or not Mr. Thompson made any referenc in his discussion with you about any tariff?

A I can't say positively one way or another. I have no recollection that he did.

Q Now, Mr. Walters, when you were on the barge and inspecting it, did you personally look into the compartments?

A Mr. Sanders and I made the inspection tour together, and he was the supervisor who was going to complete the loading there, as I had to leave that morning before the loading would be completed, and we looked in the hatches with a flashlight, and crawled in part of them to see that the barge seemed in good order for the handling of the equipment.

Q You know that the barge was equipped with sponsons?

A I am not familiar with your term.

THE COURT:

What do you mean?

BY MR. KOHLMEYER:

Q In other words, Mr. Walters, an extra compartment on the outside of the hull, on each side, to aid the buoyancy and stability?

A Wasn't that only on the bow end, there, where they had -- to the best of my recollection, the barge was the complete unit, except right on the bow, where the loading ramp had been for the ferry, where they had an addition placed on it.

Q You mean there was a sponson forward? Is that what you say?

A There was a widened place -- the bottom of the bow was V shaped with a flat deck, widened out beyond the V section, but that was only on the -- only for a short distance on the bow end of the barge.

Q How deep was that barge from the top of the top deck to the bottom of the bottom deck or hull?

A The barge's dimension was 5½ depth, and that varied. It was not that deep at the forward end, that is, the compartments were not that deep on the portion you referred to as sponsons built in. As I remember, that was only a foot or foot and a half deep, but the main compartments run about 5½ feet in depth.

Q Now, I will ask you again, did you personally look into the compartments?

A I did, with Mr. Sanders.

Q. And how many compartments did you say there were?

A It's been sometime ago, and I would say fourteen or fifteen altogether.

Q Does that mean there were fourteen or fifteen hatches to look into?

A I think that I believe there were six a side, but I'm not sure. It's been too long ago.

Q Now, do you know whether or not these compartments were bulkheaded?

A From a casual observation I would say they were.

Q Do you know whether or not there were any openings in the bulkheads?

A There could have been. We didn't make that examination to see if the bulkheads were watertight.

Q Were you personally inside the barge at all?

A I went in several of the compartments.

Q And you saw no holes? No large holes?

A That is right, no large holes.

Q I show you here a picture of a barge, and point out the place that the man is working on, and ask you if you can identify that area as a sponson, and that barge as the LaBelle? (Photograph to witness.)

A It has the appearance of the La Belle.

Q Do you recognize what I mean by a sponson now?

A I do now, what you are talking about, yes.

THE COURT:

Are you offering it in evidence?

MR. KOHLMEYER:

The picture that has just been exhibited to the witness has been marked for identification Grant-1.

(Whereupon, the document above referred to, was marked Grant-1 for identification.)

BY MR. KOHLMEYER:

Q Did you go into the sponsons, Mr. Walters?

A I think that is the section that I recall was 18 inches deep, or something in that matter, and we just took a look at that, and that was all. It was too shallow to get into.

Q What do you mean by 18 inches deep?

A On the rake, on the bow end there, as I recall it, the hatch was at the forward end of this, and that was where we

were looking. It appeared to be a shallow section on the bow of the barge. (Indicating on photograph.)

Q How many trucks did you say you placed on the barge?

A We have two trucks, two Ford Pickups.

Q Those were put on the barge subsequent to the time you left, is that right?

A The only piece of equipment that was loaded on the barge before I left, was the 54 Bucyrus-Erie.

Q Was that walked over the steel deck of the barge, or were mats placed on it?

A It had mats under it as it moved across the deck around it all the way.

Q Just picked up from one place and placed ahead of the crane?

A We had ten mats for loading, for going with the barge, ten new mats.

Q How big are those mats?

A The mats were 6 x 24, I believe or 6 x 26, and the first crane on, we had the mats scattered out as far as they would go. After he had run to the end where the mats reached, which was less than halfway across, he transferred four or five of the mats around him to walk ahead on, and stayed on mats all the way to the after end of the barge, where he was going to be tied down. The balance of the mats were then used by the Koehring, with additional mats that were on the barge there for him to walk out on.

Q And those mats were left on the barge?

A They were left on the barge, underneath the two major pieces of equipment.

Q Was there any loose boards or dunnage placed on the barge?

A I was not there when it was completed. The blocking was installed after I left there.

Q What blocking do you refer to?

A The blocking and cables to keep the cranes from shifting.

Q They were put on?

A They were put on after I left there.

Q How do you know that, Mr. Walters?

A I have nothing except the word of my foreman who handled the job, and have no reason to doubt that it wasn't properly tied down.

Q Is your foreman here in Court, available to testify?

A He will be available for questioning.

Q But you, of your own knowledge, don't know whether they were blocked, or chocked, or lashed?

A No, I was there at the time the barge was received, and was there to see the first major piece of equipment loaded. I had to leave the job, and a Brown & Root man picked me up at the Opelousas Airport that morning, and I flew over the job on my way to Birmingham, where I was going, but I did not witness the completion of the loading, or the tying down that took place after all of the equipment was loaded on.

Q At the time that that crane was loaded, when you saw it, how much water was there under the bow of the barge?

A We had sounded--we had built this ramp with a drag bucket, and before pushing the dirt down on the ramp to get the barge up to it, we had carefully covered this whole area with a drag bucket in case there were any stumps there, and the bow of the barge was pushed up against the soft dirt in the ramp, and held there by two tractors during the loading, and the only contact with the ground would be, say the first 4 or 5 feet of the front end of the barge, on the sloping portion, there where it made contact with the bank, and the rest of it was in 6 or 8 feet of water.

Q Would you know how much water there was at the stern of the barge?

A The river was rather low at the time. I would assume there was 40 feet or more, because it was right by the plant, and he had been operating for two years, and we had very good water in the Atchafalaya also in that area.

Q When did you furnish the weight of this equipment to the Mississippi Valley Barge Line Company?

A I had discussed the approximate tonage, as I have mentioned before, with Mr. Thompson over the phone, and we had listed the equipment that was to be placed on it from the manufacturers' charts, and they were in a position to get the weight as well as we were, but the fact that we were less than 300 ton cargo, it was not important to us to list it.

Q Were you not requested by Mr. Thompson, or someone else in the Valley organization, to furnish a list of the equipment and the weights?

A Sometime after the movement, yes.

Q Did you personally get the bill of lading which was issued by Valley?

A It was mailed to me at Houston.

Q What did you do with it?

A I forwarded it, I believe, to the National Surety Company, and asked them what should be done. The National Surety were the insurers covering the equipment of T. L. James.

Q Has T. L. James been paid the amount of the loss of this equipment by your underwriter?

MR. DUNBAR:

I object to that question.

THE COURT:

I sustain the objection.

MR. KOHLMEYER:

Even in view of the fact that there might not be any subrogation, if the Court please?

THE COURT:

The suit is brought in the name of T.L. James, and are you suggesting T. L. James isn't the proper party to bring the suit?

MR. KOHLMEYER:

It might be.

THE COURT:

I think that it is a little late in the game to make that suggestion, because I think they would have a right to bring it, and with the insurance company required to contribute, or T.L. James Company required tocontribute--

MR. DUNBAR:

We would be glad to give him a copy of the loan receipt.

THE COURT:

It is a loan receipt arrangement?

MR. DUNBAR:

Yes, it is.

MR.KOHLMEYER:

That is all we have.

MR. DUNBAR:

We have no objections.

Your Honor, we are going to have to call another witness to identify this letter agreement, because Mr.Walters is leaving town; however, the other individual can identify it.

THE COURT:

I think that will be all right. I think Counsel will admit his qualifications.

MR. KOHLMEYER:

That is right.

MR. DUNBAR:

We will call Mr. Creppel.

CHARLES CREPPEL: called as a witness at the instance of the Libellant, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DUNBAR:

Q Would you please state your name?

A Charles Creppel.

Q Where do you live?

A Lafitte, Louisiana.

Q How old are you, Mr. Creppel?

A Thirty.

Q What is your occupation?

A Tugboat.

THE COURT:

What is your occupation?

THE WITNESS:

Marine towing.

BY MR. DUNBAR:

Q How long have you been engaged in marine towing?

A About six years.

Q Were you engaged in marine towing in December, 1954?

A Yes.

Q Do you recall towing the Barge La Belle in 1954?

A Yes.

Q What tug were you operating then?

A The Tug Nile.

Q Who owned the Nile?

A I did.

Q Your own boat?

A Yes, sir.

Q Could you describe the Nile very briefly for us?

A It's a wooden hull, about 50 x 15, 165 horsepower diesel.

Q Single engine?

A Single engine.

Q Is she operated from the pilothouse or engine room?

A It is pilothouse controlled.

Q When was she built?

A 1945.

Q Can you explain the circumstances under which you got the job to two the La Belle?

A I got the job from Dominoe, from Joe Dominoe, Joseph Dominoe.

Q Did you talk to Mr.Dominoe himself?

A Yes, sir.

Q Can you tell us briefly what the arrangement was?

A He told me what the job was, to pick up the Barge La Belle, and take it to Krotz Springs, and have them load it, and then return back to New Orleans.

Q Who were you towing for?

A I worked for Joe Dominoe.

Q Who paid you for the job?

A Joe Dominoe.

Q Did you know who owned the barge?

A I picked it up at McDonough Construction.

Q Do you know who owned the cargo on the barge?

A T. L. James.

Q Do you remember what day you got this job?

A I didn't remember, but I looked it up in my log. I started the job on December 4th, 1954, and ended December 8th.

Q Where was your boat when you got the job?

A I was working around Harvey.

Q You say you picked up the barge on the 4th?

A Yes, that's when I started the job, on the 4th.

Q What inspection, if any, did you make of the barge at the time you picked it up?

A Well, the barge looked all right to me. I didn't inspect it.

Q Could you describe the barge?

A Well, it was an old hull--I mean it wasn't a regular barge, and it looked like some boat that had been converted into a deck barge.

Q Do you know the dimensions of the barge?

A Roughly I would say about 150 x 35.

Q Did you notice whether the barge was compartmentalized or not?

A No, I didn't.

Q Did you go down into the hull?

A No, sir.

Q Do you know how many compartments that there were?

A No, I don't.

Q Was there any way to get into the hull of the barge?

A Well, I never noticed. If they'd had a hatch, or something, I would have noticed it. I never noticed, though.

Q Did you notice the condition of the plating of the barge?

A No, sir.

Q What time did you depart for Krotz Springs?

A I don't remember, sir.

Q Was it in the morning or in the afternoon, or --

A If I remember right, it was in the afternoon.

Q Who was aboard the Nile, in addition to yourself?

A Percy Creppel.

Q What was his job on the boat?

A He was relief captain.

Q Where does he live?

A Crown Point.

Q Do you know where he is now?

A He is out on a fishing boat.

Q Can you describe how you had the La Belle made up to your vessel?

A I had it on the head of my boat.

Q What lines were you using, or cables?

A Two cables and two ropes--two lines.

Q Do you think you could draw a sketch for the Court showing how you had the barge made up?

A Yes, sir.

(Witness draws sketch.)

I am not much of a drawer, but I'll do my best.

THE COURT

Just do it roughly. Mark each one, just what they are, and put the names on them.

THE WITNESS:

Yes, sir.

(Witness marks chart.)

It was inch and a half rope, and five-eighths cable.

BY MR. DUNBAR:

Q Will you identify the tugboat and the barge?

A Yes. (Witness marks chart.)

Q Would you identify the lines or wires on the port side now?

A Yes, sir. (Witness marks chart.) This is the five-eighths cable and the inch and a half rope (indicating on chart.)

Q Will you describe briefly the rope and the wire that you put on the La Belle, where they run?

A It was two five-eighths cable running to the stern of my boat, and had two inch and a half lines to hold the bow in place.

Q Where did they run?

A To my bow of the boat, from each side of the barge.

Q Would you mark them a little more darkly so that we can see them?

A Yes. (Witness marks chart.)

THE COURT:

Now write your name on it. Write your name and the date on it.

THE WITNESS:

Yes, sir. (Witness marks chart.) You want the date of today?

MR. DUNBAR:

Yes.

THE WITNESS:

Monday, June 4th.

MR. DUNBAR:

In connection with the testimony of this witness, I

would like to offer, introduce, and file in evidence the sketch that he has drawn, and ask that the Clerk mark it for identification Creppel-1.

(Whereupon, the document above referred to, was marked Creppel-1 for identification, and received in evidence.)

BY MR. DUNBAR:

Q Mr. Creppel, on the trip to Krotz Springs how did the La Belle rest in the water?

A Well, it rested like it supposed to.

Q How much was she drawing?

A I guess about a foot and a half.

Q How much freeboard was there?

A I guess about four, something like that, more or less.

Q How were the weather conditions on the trip to Krotz Springs?

A As far as I can remember, it was all right.

Q What, if anything, uneventful happened on that trip?

A I made a good trip, and I never had no trouble.

Q What time did you arrive at Krotz Springs?

A I don't remember.

Q Was it during the day or during the night?

A I think it was at night.

Q What did you do when you arrived?

A I tied up, and waited until morning, until the crew come there.

Q How did you tie up?

A Alongside of the bank.

Q Which bank are you referring to?

A Well, I was going up the river, and I tied up on the left-hand side, port side of my barge was tied up to the bank.

Q What river is that, Mr. Creppel.

A I think they call it the Atchafalaya.

Q What was the depth of the water in the area, right off the bank?

A Well, I didn't sound it, but my boat draws 5½, and it didn't touch it.

Q What time did the loading operations commence?

A I don't remember the exact time.

Q Was it in the morning or afternoon?

A Yes, in the morning.

Q Did you participate in the loading operations?

A No, sir.

Q What did you do while the barge was being loaded?

A I just stayed down in my boat.

Q What was the position of the barge when it was being loaded?

A I had my barge headed into the bank, where they load it.

Q Was the barge actually made up to the bank, or was it just resting against the bank?

A I was holding it against the bank, about half speed, and they had two cables holding it from the bank.

Q What was the position of the rake of your barge in relation to the bank?

A How do you mean?

Q Was the rake of your barge higher, same level, or lower than the bank?

A It was up against the bank.

Q Can you describe in your own words how the barge was loaded?

A Well, she was loaded--in other words, she was loaded even, because I made sure she suited me before I left.

Q Can you describe the ramp that you referred to that was being used?

A It was built up there, and they had these--they call them mats that they use to get over.

Q Did you notice where the various pieces of equipment were put on the barge?

A I noticed, but I couldn't tell you for sure.

Q Was the starboard side of the La Belle ever against the bank during the course of loading operations?

A No, sir.

Q What, if anything, uneventful happened during the course of loading operations? Did anything unusual occur?

A No, sir.

Q Do you remember when all of the cargo had been loaded on the barge what time of the day it was?

A No, sir.

Q Was it daylight?

A Yes.

Q What did you do when the barge was loaded?

A When they finished up I checked to see if it was all

right, and then I got on the way.

Q When you say you checked, what did that check consist of?

A It was to see that everything was in place for me to make the trip, to see that there wasn't anything in danger of falling off, or anything like that.

Q When you made that check, what did you find?

A Everything looked all right to me.

Q How was the barge rested in the water after it was loaded?

A It was resting all right. It wasn't listing or anything

Q How much was she drawing after she had been loaded?

A I guess she had about two feet freeboard.

THE COURT:

Which would make it three? It would make the barge drawing about three or three and a half feet?

THE WITNESS:

Around three or three and a half.

BY MR. DUNBAR:

Q Was the barge loaded to its capacity?

A I don't think so.

Q Did you have any trouble with your tow on the return trip?

A No, sir.

Q How long did it take you to return to New Orleans?

A I don't remember, sir. All I know is that I started on the 4th and finished up on the 8th, but I don't remember the time.

Q Were you using the same makeup that you used on the trip to Krotz Springs, or had you changed the position of the barges?

A I used the same makeup.

Q At anytime did you change the position of the barge?

A No, sir.

Q Had your cousin ever mentioned to you that anything unusual happened on the trip when he was on watch?

A No, sir.

Q Where did you deliver the barge in New Orleans?

A Coyle Lines on the river.

Q Where on the river is that?

A That is on the West Bank, at Algiers.

Q Who did you turn the barge over to?

A They've got a watchman out there, but I don't know his name.

Q Where was the Coyle landing in relation to the Mississippi Valley landing?

A It was in the same place.

Q What do you mean by "in the same place"?

A Well, that is where Mississippi Valley tied their barges up.

Q They both used the same landing?

A At that time, yes.

Q Did you actually talk to anybody when you delivered the barge?

A No, not until I got back to Harvey, I talked to Joe

Dominoe.

Q Did you talk to anybody at the Coyle landing?

A Nobody except the watchman.

Q What did you tell him?

A He always comes out and helps us tie the barges up.

Q Did you do that on this occasion?

A Yes.

Q Did he make any comment concerning the condition of the barge?

A No, sir.

Q What was the condition of the barge?

A All right, sir.

Q Do you remember or not whether any of the cargo had shifted or changed in place on the trip to New Orleans?

A No, sir, it never had shifted.

Q You remember the day and the time that you arrived?

A No, sir.

Q Approximately how long did the trip take from Krotz Springs to New Orleans?

A I don't know--about two days.

MR. DUNBAR:

I have no further questions.

Will you answer these gentlemens' questions, please?

MR. KOHLMEYER:

I have no questions, if the Court please.

MR. DUNBAR:

Can the witness be excused?

THE COURT:

You are excused.

MR. DUNBAR:

I would like to call Lieutenant Rayacich.

LIEUTENANT D. RAYACICH: called as a witness at the instance of the Libellant, having been duly sworn, was examined and testified as follows:

THE WITNESS:

May I make a point here, in the telegram authorizing me to appear here I have been instructed that I am not to be an expert witness or give opinion evidence. May I show it to you?

THE COURT:

Mark it Rayacich-1.

MR. DUNBAR:

We have no intention of attempting to qualify him as an expert, your Honor.

THE COURT:

Let the record so show.

Let's proceed.

(Whereupon, the document above referred to, marked Rayacich-1 for identification, was received in evidence.)

DIRECT EXAMINATION

BY MR. DUNBAR:

Q Sir, what is your name?

A Lieutenant D. Rayacich.

Q Where do you presently reside?

A 3849 Virgil Boulevard, New Orleans, Louisiana.

Q How old are you, sir?

A Thirty-three.

Q How long have you been in the Coat Guard?

A Since 1943.

Q How much of that time have you been an officer?

A Since 1946.

Q Can you tell us briefly what your experience in the Coast Guard has consisted of, where you have been stationed, and so forth?

A I was on sea duty since 1946, and until 1951, and I have been ashore in various marine inspection work in Norfolk, Virginia, and New Orleans, Louisiana, since that time, since 1951.

Q What was your assignment with the Coast Guard in December, 1954?

A I was investigating officer with the New Orleans Marine Inspection Office.

Q What was your rank at that time?

A I was a Lieutenant.

Q Did you have occasion to investigate a casualty concerning the Barge La Belle?

A Yes, I did.

Q Did anybody else with the Coast Guard participate, or did you make the investigation individually?

A I made it individually.

Q Would you tell us in your own words what that investigation consisted of?

A On Christmas morning I went aboard the Childress, which is a towboat of the Mississippi Valley Barge Line, for the purpose of interviewing Captain Powell, who was the skipper of that boat, and our office had been in receipt of a report that the Barge La Belle had sunk, and it was my task to interview people who were on hand, and I went there in company with a Mr.Boyd, of Mississippi Valley Barge Line, and was successful in contacting Captain Powell, and after an informal discussion with him, we worked out a statement. I wrote out the statement and he agreed that the statement covered the situation, and I got a signature on it, and that was all for that day. Then, Mr. Boyd informed me that I would be notified when the barge was on dry dock and I could take a look at it, and sometime later--the exact date I wouldn't know, unless I looked in the records--I saw the barge on dry dock.

Q When you were talking to Captain Powell did he discuss the condition of the Barge La Belle?

MR. KOHLMEYER:

If the Court please, I submit that this question is hearsay, and the answer elicits a hearsay answer, and it is irrelevant and immaterial.

THE COURT:

What is the purpose of the question?

MR. DUNBAR:

Your Honor, Captain Powell made certain statements regarding the condition of the barge, I believe, and I think that they are relevant and should be in evidence.

THE COURT:

Well, they would be hearsay as to this witness. I think that the Captain will be here himself, and when he takes the stand you can ask him about it. However, if there is a written statement, it might save some time if the witness will testify on the written statement. Of course, if it is an oral statement, the witness would have to be called back for impeachment purposes.

MR. DUNBAR:

We will pass the point for the time being.

BY MR. DUNBAR:

Q Lieutenant, in addition to discussing the casualty with Captain Powell, did you talk to anybody else?

A No, sir. The personnel who were involved, as the story was told to me by Captain Powell, were not on board at that time, and his statement was sufficient for my purposes.

Q Subsequent to this casualty did you ever see the Barge La Belle itself?

A Yes, I did, at the J. & S. Shipyard at Slidell.

Q When was that?

A May I refer to my records.

THE COURT:

Yes.

THE WITNESS:

(Viewing record.) I am sorry to say, in my own record the exact date is not indicated. I have here that the La Belle was raised on the 2nd of January, 1955, and so I assume that it was sometime subsequent to that, but I don't know exactly when

it was.

BY MR. DUNBAR:

Q Lieutenant, do you have a copy of Captain Powell's statement with you?

A Yes, I believe it is attached to this here (indicating).

Q How long is Captain Powell's statement?

A Two paragraphs--a very short statement.

Q Would you please read the statement, a copy of the statement, and tell us if it is correct?

MR. KOHLMEYER:

If the Court please--

THE COURT:

Just read it to yourself.

Will you stipulate that the Captain did give this statement and signed it?

MR. KOHLMEYER:

I don't know if he did or not, Judge, but I presume, of course, he did.

THE COURT:

Suppose you read the statement to yourself and make certain that this is the statement that you took of the Captain, and see if that is the statement.

MR. KOHLMEYER:

Whether it is or isn't, if the Court please, I don't see where it would be admissible.

THE COURT:

It is not admissible at this time, but we are trying to complete this witness' testimony, so as to keep the witness

from coming back.

Is that the statement? Suppose you give it to Counsel, and Counsel mark it.

THE WITNESS:

I am embarrassed to mention this, your Honor, but I thought I had my own file here complete, and this is Mr. Dunbar's copy, and he let me use it in order to refresh my own memory, and I have our statement actualy in my own office file, and I do not have now Captain Powell's statement for the purposes of comparison, but this is the gist of what he told me, to the best of my memory.

THE COURT:

Is that the copy of the statement?

THE WITNESS:

Yes, it is.

THE COURT:

Is that a verbatim copy?

THE WITNESS:

I don't know.

THE COURT:

How long will it take you to get the copy?

THE WITNESS:

I could get to the Custom House and be back hereby 11:00 o'clock.

THE COURT:

Suppose you get the copy.

MR. LEMLE:

We will stipulate that this is a copy, your Honor.

MR. DUNBAR:

That is agreeable to me.

THE COURT:

Let's proceed to something else. Mark it for identification.

MR. DUNBAR:

I ask that it be marked for identification, Rayacich-1. That is just the statement.

(Whereupon, the document above referred to, was marked Rayacich-1 for identification.)

BY MR. DUNBAR:

Q Lieutenant, who was present when you inspected the La Belle at the J. & C. Shipyard?

A A surveyor whose name escapes me, and there was an operating manager for McDonough Construction Company that was present.

Q Do the names Linghrin or Grant have any significance?

A Yes, Mr. Linghrin was present, and the McDonough Construction man, Mr. Landrum.

Q Mr. Landrum?

A Yes.

Q Do you remember whether Mr. Grant was present or not?

A I don't recall Mr. Grant.

Q What did your inspection consist of, specifically?

A The barge was dry, up on dry dock, and I just made an underwater body inspection.

Q Did you go into the various holds?

A I can't remember going into them, but I must have because

I made a comment on the watertight bulkhead in my report. I can't remember actually having gone in.

Q What did you find on inspection of the barge?

A May I refer to my record again?

THE COURT:

Yes, surely.

MR. KOHLMEYER:

I don't know if Lieutenant Rayacich is an expert here and can testify as what he found on a survey of the barge. I submit that he should be qualified as an expert, if he is going to be called as an expert.

THE COURT:

I think he can testify as to what he saw, and if he gets into an expert field, we will stop him, because he is under instructions not to get into that field, and the Court will stop him. I think he can testify as to what he saw.

I overrule the objection.

THE WITNESS:

May I read directly from this?

THE COURT:

The question is what you found.

THE WITNESS:

I found a hole in the starboard side of the barge, about two-thirds of the way back from the bow. The hole was deep L shaped tear about 30 inches by 30 inches. The plating was set in about 8 inches. The plate thicknesses were ruptured, and was noted to be 1/4 of an inch.

BY MR. DUNBAR:

Q Did you inspect the plating of the barge yourself?

A Well, I took a walk around the barge, in the least, and I noticed that it was whole in all respects, other than for that one opening, and I didn't inspect the plating as to its thicknesses anywhere else. That would have necessitated drilling holes, and I didn't do that.

Q Did you inspect the plating for thickness at any other point in the vicinity of this particular hole?

A Immediately adjacent to the tear where the plate thickness was exposed, I noted it was 1/4 of an inch thick.

Q After concluding your investigation did you make any report concerning the seaworthiness of the La Belle, and its fitness for the intended use?

MR. KOHLMEYER:

We object to that. It calls for an opinion which he hasn't been qualified to give.

MR. DUNBAR:

I think his findings, your honor, is a question of fact, and I think he has the right to tell the Court what he found.

THE COURT:

I sustain the objection. He has the right to tell us what he found, but not his opinion as to what he found. He said he found the hole. You say that it was two-thirds of the way back to the stern, and how far off the starboard side?

THE WITNESS:

Your Honor, it was about two-thirds of the way back from

the bow. In other words, one-third from the stern, on the starboard side.

THE COURT:

On the starboard side?

THE WITNESS:

Yes, sir.

THE COURT:

Where was it with reference to the starboard side?

THE WITNESS:

It was, as I recall, underneath the--

THE COURT:

It was on the bottom?

THE WITNESS:

Yes, sir.

THE COURT:

With reference to the starboard side, where was it?

THE WITNESS:

Very close to the side.

THE COURT:

One foot, two feet?

THE WITNESS:

One foot or better--it wasn't two feet from the side, but thereabouts.

THE COURT:

I sustain the objection as to what his report shows.

Let's proceed.

BY MR. DUNBAR:

Q From the appearance of the hole, could you tell what caused the hole?

MR. KOHLMEYER:

We object again, if the Court please.

THE COURT:

I sustain the objection.

I would like to know something more about that. Did that appear to be a round hole?

THE WITNESS:

No, it was an L shaped tear.

THE COURT:

L shaped?

THE WITNESS:

Yes, sir, L shaped. It was 30 inches, approximately, in one direction, and 30 inches in another direction. I don't know if it was exactly at right angles, but thereabouts.

THE COURT:

Was the tear a cut along the lines of the angle, and the balance of it pushed in? Do you follow me? In other words, you say that it was an L shaped tear?

THE WITNESS:

Yes, sir.

THE COURT:

Was it a sharp tear along the L?

THE WITNESS:

That I can't follow, maybe if I explain it I could

answer your point. As I recall the thing, it was, if you can visualize and L shaped opening, with the inner section, as I remember, pushed in so that it seemed to be the result of impact damage --

MR. KOHLMEYER:

I move that that be stricken, if the Court please.

THE COURT:

I overrule the objection.

Did the L have a sharp point in it?

THE WITNESS:

Yes, sir, it was not a generally rounded point, at any rate, and it was really sharp.

THE COURT:

There seemed to be a sharp point on the L?

THE WITNESS:

Yes, sir.

MR. DUNBAR:

That is all we have, your Honor.

CROSS EXAMINATION

BY MR. KOHLMEYER:

Q How wide was the L?

A One line was 30 inches, and the other line was 30 inches.

Q How wide, that is, the length?

A You mean the opening?

Q Yes?

A My memory escapes me, but shall we say it was not over 4 inches, and it might have been only 2. It varied, of

course, from extremity to extremity, and I imagine, generally the opening was greater as you approached the middle section.

THE COURT:

Suppose you draw a picture of that L.

THE WITNESS:

Yes, sir. (Witness draws chart.)

I have here what I consider this as the starboard side, and I consider what I have here -- this would be the center line of the opening, and the dotted line would represent the plating, and this section, as I recall it, and this is probably a little bit too set in, pushed in, if they were open up. It wasn't a tremendous gaping opening, and this wasn't a 30 inch width opening, and by that I mean -- I don't think that it was more than 4 inches, and that was sometime ago, and I can't remember exactly, but I think that is a fair representation. (Indicating on chart.)

THE COURT:

Along what lines was the opening of 4 inches? Was it along both legs of the triangle?

THE WITNESS:

Let's say that the 4 inches was from here to here, and from here to here, (indicating on chart) and it tapered down to nothing after the dots. Is that plain enough?

THE COURT:

In other words, you would say that was an L shaped cut in the vessel, 4 inches, or approximately 4 inches wide, tapering towards the ends?

THE WITNESS:

Yes, sir.

THE COURT:

And, of course, nothing, tapering down to nothing?

THE WITNESS:

Yes, of course, nothing at the end, and that is as fair a representation as I can give, considering the time that has elapsed.

MR. DUNBAR:

I would like to offer, introduce, and file in evidence this sketch, and mark it for identification --

THE COURT:

Let Counsel proceed with the witness, and you will have him back and then you can offer it.

BY MR. KOHLMEYER:

Q Do I understand, Lieutenant Rayacich, you have marked two dots on the top and bottom side of the L, and that those two dots across are approximately 4 inches, is that correct?

A Yes, from here to here it is approximately 4 inches, I would say. (Indicating on chart.) I don't believe it was anymore than that. And, similarly, from this point to this point (indicating on chart).

Q So there are three dots which are equidistant then of 4 inches?

A That is correct, yes.

Q How was the cut set in, Lieutenant?

A I'm sorry. I don't follow you.

Q Was it cut out like you would take the top off of a

sardine can, or was it set in? Was there a point there, and if it had been bent back down, would it have covered the opened space?

A You mean if a person could put it through a rolling machine, or something like that? Yes, I believe it would have covered the opened space.

Q Where was the set in portion? Was it directly up, or was it to the side, or was it leading from one angle to the other?

A I am sorry, I can't recall that. In fact, I am not certain about my recollection of your previous question, absolutely sure whether or not there had been some cropping, or some such thing. I'm not even sure about that.

Q You know what the term set in means in connection with collision damage or ---

A Yes.

Q And you are not prepared to say whether this plate was set in or not?

A Yes, I am prepared to say that it was set in, but I believe you included a comparison of the rolling machine, and I am not so sure about that now. Whether the barge had some work done on it before I got in the shipyard or not, I don't know. I just can't remember about the thing, if it would have come out flush if it had been put through a rolling machine. It was set in, and, for instance, may I demonstrate with a piece of paper? If this is the normal appearance of a perfectly sound body, underwater body, then, and if some impact came

along and shoved the plate up, shifted the plate up in that vicinity and causes a tear, of course, it remains in that position. Is that what you call set in? (Indicating with a piece of paper.) Is that the common understanding?

Q Yes.

Was there any scouring on the bottom of the barge before you reached the torn portion?

A I can't recall.

Q You mean your can't recall there was any, or you don't remember one way or the other?

A I don't remember one way or the other.

Q Do you know what a sponson is?

A Yes.

Q Do you recall whether this was on the sponson or in the hull, or just where it was?

A I know that it was either on the sponson or adjacent to it. I can't remember where it was.

Q Do you know how big the sponson was?

A I can't recall. It seems to me about a foot and a half or two feet, but I can't recall positively.

Q What width or depth?

A Width?

Q Yes, how deep was it?

A I believe the entire depth of the vessel.

Q How long was it?

A Most of the length, if not all of it.

Q How far from the side of the vessel was the tear, Lieutenant?

A As I recall, it was within two feet.

Q And the L that you refer to, did the arm go in towards the center line, and the other arm go aft towards the stern of the vessel, is that what you mean by the L?

A I can't recall if the arm went forward or if it went aft.

Q Can you recall how far from the side of the vessel the L started? Did you answer that it was between a foot and a foot and a half or two feet, I'm not sure what you said?

A Well, around there.

Q Around two feet, is that the answer?

A Yes.

Q Is that correct?

A As I recall, it was near the edge, and if I have to say a certain number of feet, I would say approximately two feet, but I just can't recall the exact details.

Q So that there was no damage between the side of the vessel and two feet, to the best of your knowledge?

A To the best of my recollection, I believe that is what the situation was. And, when you say that there was no damage, there might have been some setting in in that point, but I just can't recall. I can't recall whether there was or wasn't, either way.

Q And then the L ran in towards the center line for thirty inches, and then either forward or aft for thirty inches, and you don't remember which?

A Somewhat like that.

Q And the maximum width of the hole was four inches?

A To the best of my recollection it seemed that is what it was, about the maximum.

MR. KOHLMEYER:

That is all.

MR. DUNBAR.

Your Honor, I would like to have the sketch that the Lieutenant has drawn introduced in evidence and we'll offer it, and ask that it be marked for identification as Rayacich-1.

(Whereupon, the document above referred to, marked Rayacich-1 for identification, was received in evidence.)

MR. DUNBAR:

We have no further questions.

MR. KOHLMEYER:

No questions.

MR. DUNBAR:

We would like to have this witness excused, your Honor.

MR. KOHLMEYER:

No objection.

THE COURT:

You are excused, Lieutenant.

We will recess for lunch until 1:00 o'clock.

AFTERNOON SESSION

THE COURT:

You may proceed.

MR. DUNBAR:

We would now like to call Mr. Sanders.

W. R. SANDERS

called as a witness at the instance of the Libellant, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DUNBAR:

Q Would you please state your name and address?

A W. R. Sanders, Covington, Louisiana.

Q How are you, Mr. Sanders?

A Thirty-three.

Q What is your occupation?

A At present?

Q At the present time, yes?

A I am Supervisor for the Louisiana Bridge Company.

Q By whom and in what capacity were you employed in December, 1954?

A I was employed by T. L. James & Company, and under Mr. Walters, and I was foreman for the company.

Q Do you recall supervising the loading of the Barge La Belle in December, 1954?

A Yes.

Q Who was present when that barge was loaded?

A Mr. Walters was there, and about four or five other men. Do you want their names?

Q Well, who was your foreman?

A Mr. Walters was. I was directly under him.

Q You were directly under Mr. Walters?

A Yes, sir.

Q Do you remember specifically what equipment was loaded on the barge?

A Yes, sir.

Q Can you list the equipment?

A It was a 54B Bucyrus; and 803 Koehring; a D8 Caterpillar Tractor; two pickups; two welding machines; and a tool house that was loaded with miscellaneous rigging gear; a drag bucket; two sections of booms; ten mats.

Q What was the total tonnage of that cargo?

A About 200 tons.

Q Who owned the cargo?

A It was owned by T. L. James & Company.

Q When did the loading operations commence?

A December 6th, 1954.

Q. When did the La Belle arrive?

A The morning of December 6th.

Q What inspection, if any, was made of the barge when it arrived at the scene of the loading operations?

A We went down and took all the hatches off, went inside the compartments, checked them over and looked at them and to see that the compartments were reasonably dry, and there was no signs of any cracks, or anything in the plating on it.

Q When you say "we", who else was with you?

A Mr. Walters and myself.

Q Did anybody else except Mr. Walters accompany you?

A No, not as I remember.

Q Can you briefly describe the Barge La Belle?

A Yes. To a certain extent. The barge was about 40 feet wide and about 150 feet long, and has a fairly high rake on the bow, and the stern is fairly high, and it has, on both the bow and the rake, it has a ramp, kind of cut into the bow and the rake, and the barge was about 5 foot 6 inches in depth.

Q Do you know how long the barge is?

A Approximately 150 feet, to the best I can remember.

Q Had you ever seen the barge before?

A No, sir.

Q How many compartments did the barge have?

A There were twelve covers on it, twelve manhole covers, which included the bow and the rake, both, and right offhand I would be afraid to say just how many compartments there were; whether one manhole or two manholes went in one compartment or not I couldn't say.

Q How many compartments did you enter?

A All compartments down at the bow, and all compartments down across the deck. We had the covers off and went into them.

Q What did you find in those compartments?

A The compartments were fairly dry, reasonably dry, and no signs of any leakage or anything inside the compartments.

Q How much freeboard did the barge have when it arrived, or did you notice?

A No, I didn't measure that to see how much they had on the barge empty.

Q What did you do after your inspection was completed?

A We covered the manholes back up and started loading the barge.

Q What was the position of the barge during the course of the loading operations in relation to the bank?

A We were loading on the west bank of the Atchafalaya River, and the bow was into the bank. In other words, the barge crosswise of the river, with the bow into the west bank.

Q How deep was the water in the vicinity of the bank at the place where the barge was against the bank?

A I couldn't tell you that.

Q What was the position of the rake of the barge in relation to the bank?

A It was against the bank.

Q Was the rake of the barge above the bank, the same level of the bank, or below the bank?

A It was up on the bank. In other words, we brought the barge into the bank, and put the field to it.

Q Can you explain how the bargo was loaded on the barge?

A Yes.

Q Will you please do so?

A The Atchafalaya River at that time was very low, and we had to dig a slip to get down to the river, and we walked down this ramp on mats, and laid mats out to the barge, and matted each piece of equipment down across the barge until we got it to the location that we wanted it.

Q How long did it take you to load the barge?

A About seven hours.

Q Was the position of the La Belle changed at anytime during the course of the loading operations?

A No, sir.

Q Mr. Sanders, could you draw a sketch outlining exactly where the various equipment was placed on the barge?

A Yes. (Witness draws sketch.)

Q Please identify each piece of equipment?

A All right.

Q Mr. Sanders, what equipment, if any, was secured or lashed to the deck of the barge?

A The only equipment that was actually lashed to the deck was a drag bucket and one section of boom.

Q Was the remainder of the cargo unsecured?

A The remainder of the cargo was all chocked on board the barge.

Q Would you explain what you mean by chocked on board of the barge?

A Well, say that we chock a piece of equipment on the barge, well, each of the large machines, which were the cranes on board, were sitting on five mats, and we had some timbers that were bolted together that were 16 x 32 inches, that was across each end of the track, and it was chocked down by triangular chocks, and nailed to the mats. Along each side of the tracks were 4 x 4's that were also chocked down so as to keep the cranes from slipping sideways off the mats.

Q Were the pickup trucks secured in any way?

A Yes, they were. They couldn't move from one mat to the other. We had mats right against each end of them.

Q I ask that you sign this sketch that you have just

drawn, and I am going to offer it, introduce it, and file it in evidence and ask that it be marked Sanders-1 for identification.

(Whereupon, the document above referred to, marked Sanders-1 for identification, was received in evidence.)

BY MR. DUNBAR:

Q Mr. Sanders, what inspection, if any, did you make when the cargo was loaded, after the cargo was loaded?

A I stayed on board the barge until we were in the river, so as to be sure that the barge was in trim, and that it showed no signs of leaking.

Q How was the barge sitting in the water?

A Afte. the barge was in the river it had between 24 to 30 inches freeboard in the lowest part of the barge.

Q How do you know that?

A I had a tape with which to measure from the side of the barge to the water.

Q What place on the barge did you make that measurement?

A That was approximately in the center, and the barge there was about the lowest point of the barge.

Q Do you know the capacity of the barge, the tonnage capacity of the barge?

A Well, other than what I have been told how much the barge was good for, that barge was good for about 130 tons to the foot.

Q So that would give it a total capacity of how much?

A Well, about 500 tons, or 450 to 500 tons.

Q You mentioned that after you had completed your original inspection that you replaced some hatch covers. Could you describe those hatch covers?

A Yes, those hatch covers were square in shape, and on the deck of the barge was angle iron that had been welded to the deck and the hatch covers had the sides crimped on them so that it would go down right over those hatches.

Q Who actually replaced the covers?

A I did.

Q What time did the La Belle get under way?

A The La Belle got under way shortly after 2:00 o'clock.

Q Did you ever see the La Belle again after she left Krotz Springs with that cargo?

A You mean while it was loaded?

Q Yes?

A No, sir.

Q When was the first time you heard about the casualty in which the barge sunk?

A The following Monday morning.

Q How did you hear about it?

A Mr. Walters called me. I was in National City, Tennessee, and he told me he had a report the barge had sunk.

Q Do you have any firsthand knowledge of the salvage operations?

A No, sir.

MR. DUNBAR:

That is all.

Would you answer these gentlemen's questions.

CROSS EXAMINATION

BY MR. KOHLMEYER:

Q I notice on your sketch, Mr. Sanders, that the boom section is at the bow of the barge? Is that correct?

A There was a ten foot section of boom that was fastened on the blade of the D8 Caterpillar.

Q And that was loaded on the bow?

A That is right.

Q How do you know the bow from the stern of this barge?

A Well, there is quite a bit of difference in the construction of the barge from one end to the other. The bow of the barge there is V-shaped protruding on it, like it was actually a bow, and the stern of that barge doesn't V.

Q In other words, if you'd look down at the barge from a top view, you could see the point of the bow?

A No, sir. You have to see the barge from the side.

Q She is rounded from underneath in the bow?

A That is right.

Q And square over the stern?

A No, it is not square on the stern; it has a rake on the stern too, but the bow of that barge has a point to it, similar to a ship. In other words, it comes down -- it comes around under and over that comes to a point.

Q How is the stern?

A The stern is comparatively round.

Q With no point, is that it?

A That is right.

Q Do you know if there were any timberheads or cleats, or cavels on the deck of the barge? Do you understand that terminology?

A No, I don't quite follow you.

Q Was there anything on the deck of the barge with which you could make a line fast?

A Yes, there was bitts on the barge.

Q Will you tell me where those bitts were?

A You mean the location of that?

Q Yes? And also what sort of bitts they were?

A Oh, they were long bitts, the best I remember, and they were 18 to 20 inches long. They were off the deck 8 to 10 inches. I couldn't tell you how many there were on it.

Q You don't remember how many?

A No, sir.

Q Do you know what a timberhead is? Do you recognize that terminology?

A No, sir.

Q I show you here a picture which I have marked Grant-3 and ask you if you can identify this as the Barge La Belle? (Photograph to witness.) Is that the La Belle?

A Yes, sir.

Q And that barge, does it have the stern or the bow facing you?

A This is the bow of the barge, this end (indicating on photograph).

Q That is the end facing you, is that correct?

A Nearest.

Q Nearest to you as you look at the picture?

A Yes, sir.

Q Well, these items are what I call timberheads, do you see them? (Indicating on photograph.)

A Yes, sir.

THE COURT:

What do you call them, Mr. Sanders?

THE WITNESS:

Just bitts, Judge.

BY MR. KOHLMEYER:

Q I show you here another picture marked Grant-4, and ask you if you recognize that as the La Belle? (Photograph to witness.)

A Yes, I would say so.

Q And is the bow facing you, or is it away from you in that picture?

A I say the bow is to me.

Q And the cleats that you referred to in your testimony before, is that cleat which I point to at the stern of the barge, is that correct? (Indicating on photograph.)

A Yes, sir. Well, I can't say right offhand -- I wouldn't say because I don't remember.

Q Well, how big is a mat, Mr. Sanders?

A The particular mats that we were using were 5 feet by 26 feet, by 8 inches.

Q Will you give me that again?

A 5 feet by 26, by 8 inches.

Q How much do these mats weigh? Just in round figures?

A I would say around a ton, or maybe a ton and a quarter.

Q And you have ten of those on board, s that right? Ten new ones?

A Yes.

Q How many old ones did you have?

A We only had the four that we had the machines chocked with. That was all the old ones on board.

Q So you had fourteen mats on board, is that correct?

A Yes. The old mats were made out of fir instead of out of oak or gum.

Q Were those mats stacked one on top of the other?

A No, sir.

Q All were on the deck?

A They were flat and the machines were on top of them.

Q And no two mats were one on top of the other?

A No, sir.

Q Now, the way you have drawn your sketch, marked Sanders-1, do I understand that the D8, or this Koehring Dragline was crosswise on the barge, or was it lengthwise on the barge?

A It was lengthwise. In other words, the track run in this position (indicating on chart).

Q And the same thing on the 54B?

A That is right.

Q And on the pickup trucks, they were lengthwise too?

A That is right.

Q And the D8 Caterpillar was lengthwise?

A That is right.

Q So that would be generally in the same position as the dragline appears in Grant-3, and Grant-4, on the deck of the barge?

A Yes.

Q Is that right?

A That is right.

Q I think you said that you were actually inside that barge, below the deck, is that right?

A Yes.

Q How many compartments did you do into?

A I went down where all the hatches were, but I wouldn't say how many compartments there are in there, because I didn't examine them to see -- in other words, the covers were off -- some of the boys took the covers off it -- and I would go down there in one and come out and go down another one, and I went in all the hatches that were opened. I wouldn't say how many compartments there were, or how they were cut off.

Q Do you know if there was any longitudinal bulkheads?

A Yes, it was divided.

Q Well, do you know how many longitudinal bulkheads there were on the barge?

A No, sir.

Q Do you know whether they were watertight or not?

A There was no water inside of the barge.

Q In any of the compartments?

A No, sir.

Q You didn't get your feet wet at all?

A Well, you might have gotten the shoe sole wet, but I mean--there may have been enough water in between the ribbing of the barge that was 1/4 or 1/2 inch deep, something like that, but as speaking of water, there was no water.

Q Now, if you would get down in that barge, in one of those manhole covers, or hatches, whatever you call them, so that you were down inside, standing upright, your head and shoulders would be over the deck of the barge when your feet were on the bottom, is that correct?

A That is right.

Q And you stooped down and pointed your light in each compartment that you went into?

A Yes, I actually went inside of the compartments.

Q And you can't tell me if they were watertight or not?

A I say they were watertight.

Q You saw no holes?

A I saw no holes, no leakage, no seepage whatsoever inside of the barge.

Q No holes leading in the bulkheads from one compartment to the other?

A No, sir.

Q Are you prepared to say there were not any holes, Mr. Sanders?

A I say I did not see any holes.

Q Suppose there had been a 3 inch hole, would you say you would have seen it?

A I think I would have. I say I think I would have seen it.

Q Do you know what a sponson is?

A No, sir.

Q I show you here a picture marked Grant-1, and ask you to look at it and note particularly the area on which the man is working. Do you recognize that as a sponson? (Photograph to witness.)

A No, I didn't know what it was. I would say that is was a blister.

Q Well, that is as good a name as any.

Did you get inside that blister?

A No, I don't think so.

Q Is there a hatch cover leading to that blister?

A I don't think.

Q Would you know whether or not there was any way to get inside of that blister?

A No, sir.

Q As a matter of fact, Mr. Sanders, do you know that that blister existed?

A I knew it was on the side of the barge, yes. I had noticed it.

Q You had noticed it?

A Yes, sir.

Q Now, what was the crimp that you referred to in the hatch covers?

A In the cover itself, it was a piece of plate that

the sides had been crimped down so as to make it come down over the side angle that it was on the deck, so they couldn't come off.

Q Do I understand you to mean that the hatch covers were so arranged that they were sort of like the top of a box, and they fit down over a coaming, is that correct?

A Yes, sir.

Q How high was that coaming off the deck?

A I would say an inch or an inch and a half, maybe. The best I remember, it looked like a piece of angle iron welded on the deck, making up the rim for this cover to go down over.

Q Are you sure you remember that Mr. Sanders?

A That is what I've got in my mind, as I remember it.

Q Were these hatch covers watertight?

A Well, I wouldn't say they were watertight, because they weren't secured, but the covers were over the top and the sides were crimped down.

Q Did they have gaskets on them?

A No, sir.

Q And no method of dogging them down?

A No, sir.

Q I show you here three pictures marked Grant-2, Grant-5, and Grant-6, and ask you if you will point out to us the crimping and the angle iron which you referred to on the hatch covers? (Photograph to witness.)

A That was not the covers that was on the La Belle at the time we loaded them.

Q That is not?

A No, sir.

Q Well, how about that? (Photograph to witness.)

A No, sir; I don't remember that cover at all. The covers we had on the La Belle at the time we were loading were square, like this, with an angle welded to the deck, and this piece here was crimped down so it would go right over (indicating on photograph).

Q So that is not it?

A No, sir.

Q In other words, none of these three pictures marked Grant-2, Grant-5, and Grant-6 represent pictures of the La Belle as you recall her?

A That is right.

Q I show you two more pictures, marked Grant-7, and Grant-8, and ask you if you can identify those two pictures as representing the deck of the La Belle? (Photograph to witness.)

A Yes, I would say that this is a similar deck to the La Belle.

Q In both pictures, Mr. Sanders?

A Yes, both pictures.

Q Will you point out to us, if you can find them on there, the type of hatch covers that you say existed?

A (Examining photograph.) No, I don't see any.

Q Are those the hatches that you went into when you made your inspection, Mr. Sanders?

A I will say that they are similar hatches, yes.

Q Do you see any coaming on those hatches? You know what a coaming is, don't you?

A No, sir.

Q Well, a little ridge that rises up around the edge of the hatch opening?

A Yes.

Q Do you see any coaming on there?

A No, sir.

Q Are you sure that you had coamings on all of these hatches that you went into in the La Belle?

A As far as I said, like I said, to the best of my recollection, and it has been a pretty good while ago, but that is the best way I remember it, it had a little -- it was like that.

Q It was like that?

A I mean it was like I told you, like I described it.

Q How could you lay those mats across these hatches if they had coamings on them, Mr. Sanders?

A If you noticed the picture of the La Belle, the deck of the La Belle is slightly irregular, and down across the deck of the La Belle we had timbers that we put on there to level the deck up. The mats went across the top of them. In other words, we kept those mats level as we went down across the deck of the La Belle.

Q What sort of timbers did you put on there?

A 2 x 8's, and 2 x 10's.

Q Over the entire deck?

A No, just in low places, enough to level the mats up.

Q Tell me where the low places were, please?

A The best I remember, it was in the center of the barge, approximately about where you saw those cranes walking in the center of the barge. It was in that location where the equipment had walked down across the deck of that barge.

Q I don't follow you by "low places," and will you state, or describe what you mean by that?

A In other words, the top of the deck was slightly curved.

Q You mean looking as if some heavy object had been placed on it and it had been bent in?

A That is right.

Q Is that what you mean?

A Yes.

Q How many places like that did you find on the deck of the La Belle?

A Just two, one on each side of the barge.

Q How long were those places?

A The best I remember, they ran the entire length of the barge.

Q How wide were they?

A 2 or 3 feet.

Q And in those two places you put these timbers, is that correct?

A That is right.

Q And then you covered that with the mats?

A And then on the side, to get those mats to lie level, we put timbers on the side in order to keep the mats level, to keep them from riding one place on the barge as we walk down across it.

Q Suppose Iwas to walk on that barge from the extreme bow and walk over to my right, as I got on the barge while you were loading it, after it was loaded, and I would then walk down to the rear or stern of the barge, would I be walking on steel or would I be walking on wood?

A I didn't quite follow you. You mean you got on the barge from the bow?

Q Yes, the way you were loading?

A And you walked directly to the stern of the barge?

Q Yes?

A You'd be walking on the steel.

Q How far over would I have to come to start walking on wood?

A I don't remember any --

Q Well, do you remember how much wood you had on the barge, Mr. Sanders?

A Are you asking how far would you have to go before you got on the wood that I put on the barge?

Q Yes?

A If you walked on the bow of the barge, probably as soon as you got on the barge you would be walking on some of that wood.

Q Would I stay on the wood all the way to the stern?

A It would be possible, yes. Understand, all that wood didn't stay there. We took part off where we used it for loading purposes.

Q I show you here the picture of -- the one identified Grant-4, that I think you have seen before, the bow of the La Belle, being the part of the vessel closest to us. Do you recall that picture? (Photograph to witness.)

A Yes, sir.

Q Suppose I got on the La Belle at the bow, on either side, and I walked towards the stern; where would I first start to walk on wood and not on the deck of the barge?

A Well, as you came off of this rake of this barge here, and got in here (indicating on photograph), which you can see here they are on no mats, and that is what made this indented place down along the top of the barge, and to keep our machines from having to walk on the barge, we put wood across here, in the low places (indicating on photograph), making the mats lay level as we walk down across the barge.

Q Was the wood under the mats or on top of the mats?

A Under the mats.

Q How did those indented places get there, do you know?

A I don't know. This is a good indication of how they got there (indicating on photograph).

Q What is that?

A This machine here that is not on mats on the deck.

Q Were the dents on the deck of the barge when you got the barge?

A I don't follow you about "the dents." the top of the barge was curved due to where they had been walking heavy objects up and down.

Q It was wavy, is that the idea?

A That is right.

Q After the barge was loaded by you, did you check to see whether or not there was any water in here (indicating on photograph)?

A You say after it was loaded?

Q Yes?

A Yes, in the compartments that I could get in.

Q Where were they?

A They were on the stern of the barge, and all but two of the compartments.

Q What do you mean by that, Mr. Sanders?

A What I mean by that is, there were two of the compartments there were mats over the top of, and that was under the 803.

Q Was the 803 on the stern?

A No, it was on the bow.

Q And you actually looked again in the barge itself before you let her go?

A Yes, sir.

Q You uncovered all of those hatch covers again?

A But the two under the 803.

Q You uncovered all except the two under the 803?

A Yes, sir.

Q And all were clear and were not fouled except those two?

A Those two.

Q Are you certain of that?

A Yes. I wouldn't say that two of the compartments -- I believe that it might have been a pickup truck that was partially over, but the tops would come off the hatches. That was two compartments right ahead of where the 54B was at.

Q You mean that to get to them you would have to crawl up under the truck?

A No, I don't mean you would have to crawl under, but you could get to them from the side of the truck, as best as I remember.

Q Were the trucks over the hatch openings?

A I would say slightly, yes.

Q Did Mr. Walters get inside of any of the compartments?

A The best I remember, Mr. Walters was in one or two of the compartments, and the rest of them, why, he would get down on deck, on his knees, and look inside of them while I was down there looking them over.

Q Was he there the whole time that the barge was loaded?

A No, sir.

Q When did he leave?

A He left right after we had loaded the 54B.

Q And you won't tell me how many hatch covers there were on this barge?

A I believe there was twelve on there.

Q And you were in each one of those twelve compartments?

A I am almost sure.

Q Now, I know you don't mean to do it exactly, but where you have placed these various objects on the barge, do I understand that on your sketch marked Sanders-1, that they were approximately in the middle of the barge? Is that right?

A The big pieces of equipment were as much in the center of the barge as we could.

Q How big is that D8 Cat? I mean in square footage, if it were squared or rounded with perpendiculars?

A I would say roughly about 9 x 12, or 9 x 13.

Q And the 803 Koehring?

A About 12 x 18.

Q And what is that 54 Bucyrus?

A Yes.

Q How big is that?

A About 12 x 18, and that is about the same machine as the 803.

Q And the tool house?

A I believe the house was 8 x 10.

Q And your pickup trucks?

A About 6 x 11, I guess, or 6 x 12.

Q And your welding machines?

A About 3 x 4.

Q How about the drag bucket and the boom sections?

A The boom section was about 2 foot square and 24 foot long, one of them was; the other one was about 10 foot long.

Q And the drag bucket?

A The drag bucket was about 2 x 3.

Q Was that boom section sitting on the deck, or was it chocked or blocked underneath in any way?

A One section of the boom, the 20 foot section of the boom had a cable across it. The other 10 foot section was tied with the blade of the tractor.

Q Was is laying on the deck?

A Yes.

Q It had no dunnage underneath it?

A No, sir.

Q How about your drag bucket?

A No, sir.

Q No dunnage?

A No, sir.

Q How about your pickup trucks?

A Nothing under them.

Q And the welding machines?

A Nothing under them.

Q And your D8 Cat?

A It was on a about 2 x 8 or 2 x 10 oak timbers that were strung lengthwise on the track to keep the cleats from biting into the plating of the barge.

Q How long were those pieces of oak timber?

A Just long enough to cover the track, approximately maybe a foot or two one way or the other.

MR. KOHLMEYER:

I think that is all.

MR. DUNBAR:

I have no further questions.

BY THE COURT:

Q These mats, will you describe them a little more in detail, please? What material were they made out of?

A They were made out of oak and gum.

Q Did you say that they were 8 inches square?

A They were 8 inch squares bolted together to make up a 5 foot mat.

Q On these 8 inches, was it 8 inches all the way across?

A Yes, they were solid timbers.

Q And they were all bolted across, bolted together?

A Yes, sir. They had been drilled with an inch and a quarter steel bolt through them, bolted together.

THE COURT:

That is all I have.

MR. DUNBAR:

In connection with the testimony of Mr.Northon, we are going to use a photostatic copy of a sketch that Captain Powell of the Childress purportedly drew, and which I understand opposing Counsel are willing to stipulate that is a correct copy of that sketch?

MR. KOHLMEYER:

Yes.

CLIFFORD C. NORTHON: called as a witness at the instance of the Libellant, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DUNBAR

Q What is your name?

A Clifford C. Northon, Jr.

Q How old are you, Mr. Northon?

A Forty-two.

Q What is your occupation?

A I am involved in several phases of the marine business, towing, transportation.

Q What has been your experience in the towing field?

A I have been involved in the towing business since 1930, and I'm still involved in various phases of it.

Q By whom have you been employed?

A From 1930 to 1948 I was employed by the Federal Barge Lines.

Q In what capacity?

A In all capacities of the deck department, including master and pilot.

Q How many years did you act as master and pilot for the Federal Barge Lines?

A I first started as a pilot in 1933, and first served as a master in 1935.

Q And for how many years did you serve as a master?

A Well, ever since 1935 I have served as a master on various boats, including some of which I operated myself.

Q What licenses, if any, do you hold?

A I have a master's license for any river of any tonnage.

I have a first class pilot's license from New Orleans to the mouth of the Illinois River.

Q When did you obtain the first issue of the licenses you have mentioned?

A 1933.

Q Have you held them continuously since?

A Yes, sir.

Q When you were working for the Federal Barge Lines what run did you regularly make?

A I worked most of the time on the Mississippi from New Orleans up, and sometimes as far as St. Paul, Minnesota.

Q Could you name the vessel or vessels that you worked on?

A There were quite a few, starting off with the Cairo, the Natchez, the St. Louis, the Vicksburg, the Baton Rouge, the Missouri, the Minnesota, the Kansas City, the Truman, and the Huck Finn.

Q What type of vessel or vessels were mentioned?

A All of those were towboats, pusher-type towboats, commonly called push-type towboats.

Q Did you work for any other river towboat concern other than Federal Barge Lines?

A None other than those that I operated myself, boats that I operated myself. I worked on those. That was in my own business, and I called it the Star Towing Company.

Q What experience, if any, have you had in actually making up river tows?

A All of the years that I was with the Federal Barge Lines, and actually became involved in making up the tows, and in

the years that I have operated my own boats, occasionally I had to make up tows for operation on the rivers.

Q Are you familiar with the river in the vicinity of the Plaquemine Locks?

A Yes, I am.

Q How many occasions would you say you have passed that area up the river on a trip?

A I have never counted them before. I never tried to count them--it would be quite a few--but I used to operate regularly over that route. I couldn't even attempt to say how many it would be, but it would be somewhere in the hundreds.

Q Do you know the stage of the river in that vicinity on December 11th, 1954?

A I saw a copy of the report from the U.S. Engineers indicating that the stage was approximately 3 feet at that time.

MR. DUNBAR:

We would like to tender Mr. Northon as an expert witness on the makeup of tows and navigation of the river.

THE COURT:

You may examine.

MR. KOHLMEYER:

No cross-examination.

THE COURT:

You may proceed.

BY MR. DUNBAR:

Q Mr. Northon, could you describe the river in the vicinity

of Melodian Point, opposite the Plaquemine Locks?

A Yes, the Melodian Point is what could sort of be considered a distinct, sharp point, with the river being approximately 2000 feet wide from bank to bank, right at Plaquemine, and the City of Plaquemine, and the Locks are directly across from Melodian Point.

Q Is the turn at Melodian Point a turn to the right or a turn to the left for a vessel proceeding up river?

A For a vessel proceeding up river it is a turn to the right.

Q Are there any shoals or sandbars in the vicinity of the point?

A Right on the point, at Melodian Point, it is fairly deep. Right over to the point they have a little sandbar that tapers out from the point. Immediately above the point the water is shoaled, and it flattens out to where about a half a mile approximately above the Melodian Point light, or above the extreme Melodian Point, there is what is commonly referred to as a middle bar, which is a sandbar that is out away from the main shoreline. Only in very extreme low water could it be considered dry from the middle ground over to the main shore.

Q What is the approximate depth of the water on the starboard ascending bank in the vicinity below the point?

A On the east bank below the point, below Melodian Point, after you leave the extreme point, the depth of the water decreases to where you have a shoal down below Melodian Point. The river widens out at that point, and the part over on the easternly shore is somewhat shallow. It is too shallow to

operate over there in the lower water stages.

Q Would it be possible to ground a barge, a pusher barge in that vicinity of the river?

A You mean below Melodian Point? Below Melodian Point the shore is very flat, tapers out very flat, and a barge could be grounded on the shore down below the point, in the low water stages, when it is approximately 3 feet on the Plaquemine gauge.

Q Could a barge be pushed aground on the opposite bank, on the west bank?

A It isn't very likely that a barge could be pushed aground on the west bank. That shore along there is all revetted with this rock and slab revetment, and it is possible that you might shove a barge up there and stick it on the bank, just the corner of it, or the edge of it, but you could hardly get it up to where you could consider the barge aground on that shore.

Q For a tow proceeding up river, that is,northernly, what is the normal course to proceed on to make Melodian Point? How is that point approached?

A Well, normally the upstream boat would run close to the middle of the river approach, and Melodian Point from below, since the channel, the deepest part of the river in the channel is on the west bank of the river, and follows closely along the west bank, the boats usually favor that side in low water stages, but it is good water, good navigating water oug as far as the middle of the river there, and most boats run somewhere near the middle of the river coming up,

approaching Melodian Point. Upon arriving about at Melodian Point, the boats sort of taper over into the bend above Plaquemine, in order to stay in the channel, which isn't as wide there as it is down below Melodian Point.

Q What speed do river towboats generally make at that point?

A There is nothing at the point that would normally necessitate a boat slowing down. A boat would continue at its usual speed, whatever that might be, under normal conditions.

Q Mr. Northon, I show you a sketch purportedly drawn by Captain Powell, the pilot operating the motor vessel L. Wade Childress, purportedly showing the position of the Barge La Belle in the Childress tow, and I would like you to look at it carefully. (Document to witness.)

A Yes.

Q Now, can you identify the La Belle in the tow?

A I see it marked here in two places, I think.

MR. KOHLMEYER:

It is understood, I presume, that this sketch is not meant to be to scale, and the tow is not meant to be necessarily in that position in the river, that is indicated on there.

MR. DUNBAR:

That is correct. My understanding is that the stipulation merely is that the sketch of the tow shows the position of the barges in the tow.

MR. KOHLMEYER:

The makeup of the tow, that is right.

THE WITNESS:

I see the La Belle in two places.

MR. LEMLE:

In other words, it was towed in that position (indicating on chart), and then she was topped around and dropped back to that position (indicating on chart). When she was under tow she was in this position, and this dotted line represents the barge after she was topped around, just before she sank. When she was towed she was here. (Indicating on chart).

BY MR. DUNBAR:

Q Captain, do you understand what the position of the La Belle was at the time prior to the time that there was any trouble?

A Yes, this was before there was any difficulty, and this is after the difficulty arose. (Indicating on chart.)

Q Now, after studying that picture, and the other barges in the tow, what is your opinion concerning the position of the La Belle in the tow?

THE COURT:

I am not sure that the witness has enough information on which to predicate an opinion at this time. He hasn't been advised of the dimensions of the La Belle, and hasn't been given a description of the other barges in the tow, and he hasn't been given a description of the load on the La Bell, or in the other barges. I think it would be well if you filled him up on those details.

BY MR. DUNBAR:

Q Mr. Northon, do you know the quantity of cargo that was loaded on the La Belle? Do you know the tonnage of the cargo loaded on the La Belle?

THE COURT:

Show him Walters-2. Use this, Mr. Northon. (Document to witness.)

THE WITNESS:

This gives the equipment, but of course it doesn't give the weight.

BY MR. DUNBAR:

Q Mr. Northon, you have heard the testimony in Court today, have you not?

A Yes.

Q Do you recall what the testimony was concerning the tonnage of the cargo?

A Yes.

Q What was that testimony?

A From what I could understand, it probably would not exceed 200 tons. Is that correct, approximately 200 tons?

Q Yes.

Now, do you know the dimensions of the La Belle?

A I heard this morning that it was approximately 35 feet by 150 feet, by 5½ feet.

Q Now, in this sketch that you are looking at, what do the three letters "MTY" mean to you?

A That would normally indicate empty.

Q What do the two letters "LD" mean?

A We could assume that is "load"; loaded barges and empty barges.

Q So, from looking at that sketch, you know which of the barges were loaded and which were empty?

A Yes.

Q Considering the dimensions of the La Belle and the amount of her cargo, could you give us an opinion concerning the position of the barge and the tug in the tow?

A It would appear that the La Belle, being only 5½ foot depth of hull, with that much equipment, wouldn't have much freeboard, and a vessel with very little freeboard, being out in an exposed area where the flow of the water, the force of the water is liable to come over the deck of the barge, it seems as though that additional precautions could have been taken by taking the empty barge and putting it in front of the La Belle so as to protect the force of the water from striking the bow of the loaded barge. This just has 5½ foot depth of hull, so the barge would probably have a draft of about 1 foot without any cargo at all on it, and then with a load on the barge it would put it down under water pretty well to where it wouldn't have an awful lot of freeboard.

Q Where would you have placed the barge if you had been making up the tow?

A Probably that position there where it is now would be all right, except that it should be sheltered in some respect, have something ahead of it rather than to be exposed like it

is here.

It wouldn't particularly matter whether it was on this side or the other side, as long as it had something ahead of it rather than to be exposed out on the forward part of the tow.

Q What is the custom on the river concerning empty and loaded barges, and their position in the tow, or is there any custom?

A Normally the heavier barges are always kept and towed back closer to the towboat. That is the procedure that is usually followed, and it usualy works better that way. The empty barges are usually towed out forward or on the outer wing, rather than on the middle of the barge. The loads are nearest the center of your tow, and as near the towboat as is practical.

Q You mentioned that the barge should have been sheltered. Can you tell us more specifically what you mean by that?

A When a barge is placed in a tow and it doesn't have anything in front of it, a barge that doesn't have much freeboard, you usually have a headlog, which is flat, and when the force of the water builds up against the headlog, the water than comes up over the head of the barge and causes the barge the additional weight on the deck, and causes the barge to dive, and that could mean most anything. It could mean that the barge will dive and take water through its openings on the deck, or through the vents, or whatever you might have there. If the hatches are open it could draw water through the

hatches. It could break the mooring lines, and break the barge away from the tow altogether. Some people that have all loaded barges in their tow, they make an effort to keep the barges out forward that have hatches on them and that are all watertight, in addition to keeping the barges out that are lighter.

Q If the La Belle did not have watertight hatches, what significance would you attach to that fact?

A If the hatches weren't watertight, and the water, the force of the water was to come over the bow, then the water could very easily go into the hatches.

Q Would the fact that the hatches were not watertight influence your opinion on where the barge should be in the tow?

A Well, if the hatches weren't watertight, it would be all the more reason for keeping the barge where you could have something else ahead of it. It would be more necessary with the hatches not being watertight to have something to protect it from the force of the water, than it would if the hatches were tight.

MR. DUNBAR:

I have no further questions at this time, but I would like to reserve the right to recall Mr. Northon on rebuttal after the other expert witnesses have been heard.

THE COURT:

You may examine.

CROSS EXAMINATION

BY MR. LEMLE:

Q Captain, have you been told that this barge, La Belle, was an old steamboat hull that had been converted to a barge, and she had a model bow, or practically pointed bow? Did you know that?

A I sort of gathered that from what I heard this morning.

Q Do you know that the Barge La Belle had no towing knees on either end?

A I wasn't aware of that. I wasn't expecting--

Q If I told you that, would that influence your opinion in any way?

A The fact that he had no towing knees?

Q On either end, yes?

A I don't think so. It is more unusual to find barges with towing knees than it is to find them without it, so that hadn't occurred to me.

Q Captain, I heard you suggest that you might put a light barge in front of the La Belle. Of course, you know that all of these Valley barges have long rakes?

A I don't know that they all have long rakes.

Q If I told you that those barges were all raked barges, what would you say? Would that influence your opinion any?

A No, sir.

Q Will you tell me, if you were to put an empty rake barge in front of the La Belle, what device you would use to keep the La Belle from running up under the rake and knocking the cargo over?

A You would use ratchets and wires.

Q To do what?

A To keep the barges moored so they wouldn't run into one another.

Q What would you ratchet and wire the barge ahead of the La Belle to?

A In this particular instance, you would ratchet it to these barges that would be on the port side of the barges that are ahead of the La Belle. That is very commonly done. That is not unusual.

Q So that your idea then would be that you would put the La Belle then as an independent unit without being fastened to anything, except the barge alongside, and not fastened to the barge ahead?

A You would have it fastened to the barge ahead also, but you wouldn't necessarily have to have a tight bearing between the La Belle and the barge ahead of it.

Q Now, Captain, isn't it customary with a light draft barge, such as the La Belle was, to put it on the head of the tow and put the heavier draft barges behind it? Isn't that customary?

A To put the lighter barges ahead, and the heavier barges behind, that is correct. That is customary.

Q So that if the La Belle has cargo not exceeding 200 tons, and is drawing approximately 2½ to 3 feet, and all of the loaded barges drew more, would it not be proper to put the heavier barges behind the La Belle?

A That would be proper. Yes, it would.

Q Isn't it a fact, Captain, that the only reason you make a suggestion to put anything ahead of the La Belle is to keep water from running over the La Belle deck? Have you any other reason for suggesting it?

A That would be the principal reason, to keep the water from coming over the deck, to keep the water from coming over the bow, to break the force of the water ahead of the La Belle.

Q So that if no water came over the bow actually on this occasion, then her position makes no difference?

A I still don't think it is good policy. I can't say that it had any particular benefit, but I still don't think it is good policy to keep it exposed like that.

Q That is your idea of policy and with which perhaps other masters might differ?

A I don't think you would find too many of them that differ from that policy.

Q Would you think that a master who put the La Belle in the position that the La Belle was placed in this case, was guilty of improper seamanship, and if so, why?

A Maybe he had a reason for it that I can't see. I can't see any reason for putting it there unprotected. Before I would want to accuse him I would want to know why he did it.

Q Unprotected from what?

A From the force of the water.

Q So then we get back to the fact that's what your idea if of the im propriety, and that is because of the fact that water may go on the deck. But, if no water went on the deck, and the testimony in this case shows that no water went on

the deck, then the position of the barge is immaterial in this case, is that right?

A I can't say that it is immaterial because I cannot agree with that as being the proper way to make up a tow.

Q I don't want to argue with you, Captain, but you keep reiterating that you don't consider that is the proper way to make up a tow, and I'll get back to it again; is there any reason why you think it is improper, other than the fact that water could come on the deck? If there is any other reason, what is it?

A Well, because if the water came over the deck, the barge is subject to taking on water and could sink. I don't know what caused the barge to sink.

Q That is perfectly true, but other than that, there is no reason for it, is there?

A There is no reason for what?

Q For not placing the barge where it was placed, other than the fact that water might come on the deck, and there is no other reason, is there? If there is, what is the reason, Captain?

A The reason for putting the barge out there with something ahead of it to protect it is to protect it from the force of the water.

Q Is there any other reason?

A There could be other reasons.

Q Well, what?

A It could be that the particular makeup of the tow or makeup of the barge would cause it to fit in the tow better

that way.

Q You mean cause it to fit better in the tow the way it is?

A Well, it is my understanding that this barge had some dragline equipment on it, machines, and machines with booms on it, and possibly the reason it was put out there was so that the machines wouldn't be an obstruction to the pilot's vision. It could possibly be that. That could be a reason for it.

Q That could be a reason for it?

A That could be, yes.

Q So that if a pilot, an experienced Mississippi River navigator making up a tow, believed that was the best way to put that barge because of its draft, its contour, its load, that is, the height of the load, would you say that was bad seamanship?

A If you consider the fact that the barge is exposed to the force of the water, I would.

Q The force of the water, Captain? Captain, what do you mean by "force of the water"? Do you mean the velocity of the water? Do you mean the force--

A The velocity of the water.

Q And what has the velocity of the water got to do with it?

A The water will build up on the bow of the barge and come up over the deck of the barge.

Q So we are back now to water on the deck, is that right?

A Yes.

Q And no matter where we go, we always come back to water on the deck?

A Once you get water on the deck, then you will have it in the holds, and then the barge will sink.

Q Is that your final conclusion, that water on the deck is not desirable and may cause barges to sink, and that is why you wouldn't put it there?

A That is one reason, yes.

Q You never have given me another reason, and that is what I have been trying to get, another reason, and you keep saying that that is one reason, and I keep trying to get another reason. Give me one more reason.

A I didn't see the barge. I don't know.

THE COURT

Mr. Witness, if you don't know any other reason, just say you don't know any other reason.

THE WITNESS:

I don't know of any other reason.

MR. LEMLE:

That is all, Captain. Thank you.

MR. DUNBAR:

We have one or two more questions.

REDIRECT EXAMINATION

BY MR. DUNBAR:

Q Have you any way of knowing, by looking at that sketch, Mr. Northon, whether the pilot of the Childress could see the

deck of the La Belle?

A I wouldn't know because I am not acquainted with how high these barges between the La Belle and the towboat might be. If these barges are loaded very heavy, then it is possible that you could see the deck of the La Belle, but if these barges are cargo barges, or if they are hopper barges that are light, then he couldn't see the La Belle from his line of vision in the pilothouse.

Q Where in the tow could he have put the La Belle so he could have seen the deck definitely?

A Well, here is an empty barge right here (indicating on chart), and the La Belle could fit right where this empty barge is here.

Q Which empty barge are you referring to?

A Well, this after port wing here (indicating on chart). He could have watched it there and kept an eye on it.

Q Are you referring to the face barge in the port string?

A Well, you would usually call these barges directly in front of the boat the face barges, and this one is the outer barge, after port string.

MR. DUNBAR:

In connection with the testimony of this witness, I would like to mark this sketch and offer, introduce, and file it in evidence with the understanding that only the part of the sketch showing the makeup of the tow has been covered. I will mark it for identification Northon-1.

(Thereupon, the document above referred to, marked

Northon-1 for identification, was received in evidence.)

MR. DUNBAR:

Your Honor, that is our case, except by agreement with opposing Counsel I understand that we are going to call Surveyor Linghrin, when he is able to appear. We are going to take his testimony by deposition. Tomorrow morning we will have a witness appear and identify the agreement between our clients and McDonough Construction Company.

THE COURT:

I have one question of Mr. Northon.

BY THE COURT

Q Mr. Northon, does a barge on the front of the tow take more of a beating, so to speak, than a barge that comes after the front row of barges?

A Yes, sir.

Q I was wondering this, whether or not the nature of this cargo would have anything to do with attempting to protect this particular barge? In other words, this cargo was certainly unusual cargo, or it so appears to the Court, and would the fact that it was composed of draglines and whatnot have anything to do with your suggestion that the barge should have had an empty barge out in front of it? Is that part of the picture at all ?

A The fact that it had a dragline or contractors' equipment on it, or whatever the equipment might be, or whatever the load on the barge might be, it wouldn't matter at all--just any barge that has very little freeboard creates a

possible hazard by having it exposed out there, because in going up the river you have occasional eddies and boils, and swells that sometimes will cause a barge to dive, and when a barge starts to dive and water starts coming over it, no matter what its got over it, the deeper it goes, and it is very likely that if the barge doesn't sink, it will break out of tow.

Q So that, as I understand it then, a barge loaded with cargo on the deck, having the same freeboard as the La Belle, and all these conditions, would not be any more dangerous in the tow than the La Belle was?

A No, sir; you would take the same precautions if the barge had very little freeboard, even if the barge was sealed tight all over. You would take the same precautions because if the water couldn't get in the barge, you could, by having the barge dive, you could have enough water up over the bow, and up over the deck to put the barge down in the water and cause it to break loose from its morrings.

THE COURT:

That is all I have. Are there any more questions?

MR. LEMLE:

No questions.

THE COURT:

We will take a five minute recess.

(Short recess.)

(After recess.)

THE COURT:

You may proceed.

MR. KOHLMEYER:

We would now like to call Mr. Thompson.

FREDERICK E. THOMPSON: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q Please state your name.

A Frederick E. Thompson.

Q Where do you live?

A Houston, Texas.

Q Where are you employed?

A I am employed in Houston, Texas.

Q By whom?

A By the Mississippi Valley Barge Line Company.

Q For how long have you been so employed?

A Thirteen years.

Q What is your capacity?

A General Agent, Houston Office.

Q What was your capacity in December, 1954?

A The same.

Q How old are you, Mr. Thompson?

A Thirty-four.

Q Did you, during December or November, 1954, handle the booking of a cargo of contractors' equipment for T. L. James, or Brown & Root, or Louisiana Bridge Company?

A I did.

Q Will you state by whom, or with whom your first contact was concerning the movement?

A My first contact concerning the movement was with the representative of Coyle Lines Inc., which led into a contact with Mr. Walters of Brown & Root.

Q Did Coyle call you, or did you call Coyle?

A Coyle called me.

Q What was the substance of that telephone call?

A The general substance was that they had been contacted by Mr. Walters concerning the movement of this cargo of contractors' equipment to Cheatham Dam, that they planned to handle the shipment on the canal, and they recommended us to Mr. Walters for the movement beyond.

Q What did you then do?

A A contact was established with Mr. Walters to get the details of the movement from him.

Q Did you make that contact or did he make it to you, or what do you mean by that?

A I am not sure--I believe he made the contact, called on Coyle's representative's recommendation.

Q Did you speak with Mr. Walters personally?

A I did.

Q On how many occasions?

A On, I am positive of two, and I believe three.

Q What was the substance of your telephone conversation?

A The initial call concerned the movement itself, the description of equipment, and so forth. It was necessary for

me to contact my St. Louis office to see if we would be able to handle such a shipment. I called back on the second call giving him the rate, and that we could, of course, handle the shipment.

Q From whom did you get the rates?

A I got the rate from our tariff.

Q Did you quote that in the telephone conversation?

A I did.

Q Did you subsequently confirm it by letter?

A I did.

Q Was the word "tariff" mentioned in either telephone conversation or letter?

A It was certainly mentioned in the telephone conversation and I don't recall the letter.

Q Was there any discussion about insurance in the telephone conversation or in the letter?

A Very definitely.

Q What was the discussion?

A The discussion was the rate did not include insurance, and that Brown & Root or Mr. Walters would have to provide his own insurance.

Q Do you have a rate which includes insurance from New Orleans to Cheatham Dam? In other words, when I say "includes insurance", which makes it unnecessary for the owner of the equipment to take out insurance?

MR. DUNBAR:

I object to this line of questioning on the ground that the best evidence of the contract is the letter confirming

the contract.

MR. KOHLMEYER:

If the Court please, the best evidence of the contract is the bill of lading, which we will, of course, put in. This is leading up to it, to determine whether or not he had knowledge of the fact that this was to be a tariff movement, governed by the terms and conditions of the tariff.

THE COURT:

The Court believes that we are going to have to have all the conversations to attempt to determine what actually took place between the parties. The letter itself is affirmatory to a certain extent of the telephone conversation, but as I remember the letter, it did not refer to the matter to which the witness is now referring. I say "the matter", that being the tariff and insurance.

Let's proceed. The objection is overruled.

THE WITNESS:

We have insured rates in our tariff. Those rates are applicable to movements of non-owned barges carrying non-owned equipment. We have a line of rates known as "C" Rates", which cover the movement of cargo in owners' barges.

BY MR. KOHLMEYER:

Q I show you here what purports to be a copy of a letter dated December 8th, 1954, addressed to Mr. Walters, marked Valley-2, and ask you if you can identify that letter? (Document to witness.)

A I wrote that letter.

Q That is the copy that you addressed, that is, a copy of the original letter which was mailed to Mr. Walters, is that correct?

A That is right.

Q I show you here a typewritten file copy of a telegram dated December 8th, marked Valley-3, and ask you if you recognize that? (Document to witness.)

A I sent that telegram.

Q I show you here a copy of a telegram marked Valley-4, and ask you if you recognize that? (Document to witness.)

A That is the reply to my telegram. That was mailed on the 8th.

Q I show you here a copy of a letter or memorandum dated December 29th, 1954, signed, "J. E. Dullahan," marked Valley-5, and ask you if you recognize that? (Document to witness.)

A That is a copy of a letter written by a traffic representative in my office confirming the cargo and the barge.

Q From whom did you get, or did your office get the information referred to in Valley-5?

A The last letter?

Q Yes?

A I don't know. Mr. Dullahan handled that. The local Brown & Root office is as close as I can come.

Q Did you know the weights of any of this equipment.

A No, we had an approximate tonnage of the entire shipment.

Q Is it possible to issue a bill of lading without knowing the weights of what you are lading?

A It is not.

Q Who is Mr. Watterson?

A He is our general agent in New Orleans.

Q As a matter of general custom does Mississippi Valley run into Houston?

A We serve Houston in connection with a certified common carrier. Our rates do not extend to Houston.

Q Mississippi Valley Barge Line Company tugboats run regularly into Houston?

A They do not.

Q Do you regularly issue bills of lading for movements which start at other points of origin than Houston?

A No.

Q Who would ordinarily issue such a bill of lading?

A The originating carrier.

Q At what office?

A On canal movements it would be Canal Carriers; on a movement down here it would be the New Orleans Office.

Q Do you recall whether or not you specified the fact there was more than one rate from New Orleans to Cheatham Dam in your conversation with Mr. Walters?

A There is only one rate, and in the owners' barges, that is a "C" rate.

Q Do you recall whether or not you discussed the difference between A-rate, B-rate, and C-rate with him?

A I don't recall.

Q Do you recall whether or not there was a mention made of the fact that this would be a tariff movement?

A I quoted from the tariff. Ordinarily we don't read the tariff to the person making the inquiry.

Q What is the customary method of quoting, as far as you're concerned, when you are asked about the rates?

A Originally, we will get a phone call wanting the rates. We will quote that rate, and tell them what it involves.

Q Was this handled in any different way than your ordinary and customary method of quotation?

A It was the usual method.

MR. KOHLMEYER:

We offer in evidence the documents identified by the witness as Valley-2, Valley-3, Valley-4, and Valley-5.

(Whereupon, the documents above referred to, marked Valley-2, Valley-3, Valley-4, and Valley-5, for identification were received in evidence.)

MR. KOHLMEYER:

We have no further questions.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Mr. Thompson, are you related to the Mr. Thompson who is Chairman of the Board of Mississippi Valley Barge Lines Company?

A I am.

Q Do you know the relationship between the Mississippi Valley Barge Lines Company and Coyle?

A I believe I do.

Q What is that relationship?

A Connecting carriers.

Q Well, does Mississippi Valley Barge Lines Company own any of the stock in Coyle Lines?

A I understand they do.

Q Do you know how much?

A No, I don't.

Q Do you know whether it is more than half?

A I know it is not. I know it is less than half.

Q What is your relationship with the Mr. Thompson who is the Chairman of the Board?

A I am his son.

Q You are his son?

A Yes, sir.

Q Mr. Thompson, you mentioned that you quoted the rate from your tariff. Specifically what did you tell Mr. Walters?

A He wanted the rate from New Orleans to Cheatham Dam. I gave him that rate and stressed the fact that it was an uninsured rate.

Q Did you mention your tariff to Mr. Walters?

A I couldn't quote from any place but the tariff.

Q I know you quoted from the tariff, but did you mention to Mr. Walters that you were quoting from the tariff?

A Yes.

Q You are certain about that?

A Yes, I am.

Q What did you tell him?

A I said, "This is our tariff rate", or words to that effect.

Q Do you know whether or not he knew what your tariff was?

A I'm sure I don't know.

Q Had Mr. Walters had any previous dealings with Mississippi Valley that you know of?

A Not that I know of.

Q Is T. L. James a regular customer of Mississippi Valley Barge Lines Company?

A Not to my knowledge.

Q Is Brown & Root a regular customer?

A They are an occasional customer.

Q You say "an occasional customer"? When is the last time you can remember that they had used your services?

A We had a barge with them the first of the year, I believe.

Q Can you remember whether Brown & Root used your services prior to the casualty involving the La Belle?

A I don't recall.

Q And you mentioned that you told Mr. Walters that you were quoting rates from your tariff, is that correct?

A That is right.

Q Was any mention made of any other provisions of your tariff?

A The insurance factor was mentioned. The way that the rate works was mentioned, in that the rate included a free return of the empty, providing it was offered within a certain

time limitation.

Q Did you tell Mr. Walters that your tariff includes what is, in effect, a release towage agreement?

A No, I'm not sure that I follow the question.

Q Part of your tariff is a standard towing contract which incorporated what we call a release towage agreement? Are you familiar with what a release towage agreement is?

A As related here I am not familiar with it.

Q Did you tell Mr. Walters that Valley would not be responsible for the loss of the La Belle, even if the barge was lost through Valley's negligence?

A I told Mr. Walters that the hull, the barge, and the cargo was uninsured.

Q But that is all that you told him?

A That is, to the best of my knowledge.

Q Do you know what the Harter Act is?

A I heard of it.

Q Was any mention made of the Harter Act in your discussions with Mr. Walters?

A No.

Q Did you mention to Mr. Walters that the freight would be earned at the time the La Belle was picked up by the Childress?

A I didn't read the tariff to him, no. I did not mention that to him.

Q In other words, it is fair to say that all you did was to quote him the rate from your tariff, is that correct?

A That is correct.

Q Did you mention that a bill of lading would be issued?

A As far as I know, a bill of lading is always issued--

Q Well, but did you tell him that one would be issued?

A I don't recall.

Q When, in fact, was the bill of lading finally issued?

A It wasn't issued in my office. I understand it was issued after we provided them with the accurate description of the cargo.

Q You have mentioned that it could not be issued until you knew the weight of the cargo, and intimated it could not be issued because you did not know the weight of the cargo, is that correct?

A That is right.

Q Is it not a fact that the rate, that the price, the charge, was made on a minimum of 300 tons?

A That is correct.

Q Isn't it a fact, Mr. Walters told you that the cargo would not exceed the minimum?

A That is correct.

Q Then, why couldn't a bill of lading be issued promptly?

A That is dogmatic, but we require an accurate description of the cargo.

Q So you weren't waiting on the weight, but you were waiting on an accurate description of the cargo?

A Which included the weight.

Q Do you know what efforts were made to get an accurate description of the cargo?

A Yes. Mr. Dullahan had quite a time getting the description. It was not ready, and he had to call two or three times, as I recall.

Q Do you know who he called?

A I do not.

Q Do you have any mention of your freight tariff, or the fact that you are certificated by the Interstate Commerce Commission on any of your letterheads that you send out?

A Not to my knowledge.

Q Was there anything on the letterhead that was sent to Mr. Walters which could indicate that you were acting as a common carrier, and were certificated as a common carrier?

A I don't know. I don't believe there was anything on the letterhead.

Q In other words, you expect your customers to know that?

A Yes, I suppose.

Q Even the customers who do not regularly deal with you?

A Almost always the mention is made that we are a common carrier somewhere in the conversation.

Q But you didn't mention that fact to Mr. Walters, did you?

A I don't know. I don't recall.

Q Except for the letter that was mailed to Mr. Walters on December 8th, and the telegram which preceded it, and Mr. Walters' telegram in reply, were there any other written documents or letters pretaining to this agreement?

A No.

Q Where was Mr. Walters when you telephoned him the second

telephone conversation?

A I believe I talked to him in the St. Charles Hotel. He was registered there. I think I talked to him once in Ruston, Louisiana, if there is such a place, and I talked to him once in Houston.

Q In which of these telephone conversations did you tell him that the rate you were quoting him was your tariff rate?

A The second one.

MR. DUNBAR:

That is all.

MR. KOHLMEYER:

We have no questions.

We would now like to call Mr. Watterson.

JULES A. WATTERSON: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q What is your full name?

A Jules Aburey Watterson.

Q What is your occupation?

A General Agent for the Mississippi Valley Barge Lines in New Orleans.

Q How long have you been so engaged? How long have you been General Agent?

A I have been General Agent here for the past 7 years.

Q How many?

A 7.

Q What are your duties as General Agent?

A My duties principally are selling barge service in New Orleans, and the territory assigned to me. Also, the allocation of barges, booking and general supervision of the Traffic Department.

Q Does the issuance of bills of lading fall within your jurisdiction on cargo originating in New Orleans?

A Yes, it does.

Q Your office issues all bills of lading on cargo moving out of New Orleans?

A Yes, that is correct.

Q What is the distribution of the bill of lading which is prepared in your office, Mr. Watterson?

A The original bill of lading is sent to the shipper, the shipping order, and a copy is sent to our Billing Department in St. Louis, and we retain a memo copy for our files. Often a memo copy is sent to the destination agent for his information.

Q Do you recall a movement of some contractors' equipment for the Louisiana Bridge Company or the T. L. James Company, or Brown & Root, originating at New Orleans on December 10th?

A Yes, I do.

Q Do you remember when you first heard of this movement?

A The first information I recall is our Dispatching Department in St. Louis called us, mentioning that the barge was in Coyle's fleet, and telling us to move it up in a tow, in the following tow.

Q Did you put it into any tow?

A We did, yes.

Q What tow?

A It was the tow that was taken up the river by the motor vessel Childress.

Q Was a bill of lading issued on that shipment?

A A bill of lading was issued on the shipment.

Q I show you here a copy of a bill of lading which is marked Exhibit-A attached to the complaint of Mississippi Valley in Civil Action 5320, and ask you if you can identify that as a copy of the original bill of lading which was issued to T. L. James & Company? (Document to witness.) And, of course covering this movement?

A Yes, that is a copy of the bill of lading.

Q When was this prepared, Mr. Watterson?

A As I recall it, that bill of lading was prepared about December 30th.

Q Can you explain why it was prepared on that date, and not prior thereto?

A Yes, the delay was due to the fact that we couldn't find out what equipment was on the barge, and the weight of it.

Q Do you ever issue bills of lading late?

A Yes, quite frequently.

Q Do you ever move a shipment under your tariff without issuing a bill of lading?

A No, we never do that.

Q Do you recall receiving a letter from your Houston

office, a copy of which I show you, marked Valley-5? (Document to witness.)

A Yes, this is the information from which we made up a bill of lading.

Q And this was the first time that you had that information, Mr. Watterson?

A I think perhaps a day or so prior to that letter we had the information by telephone.

MR. KOHLMEYER:

We offer this in evidence as Valley-6, the copy of the bill of lading which was annexed to the complaint as Exhibit "A, and which has been identified by the witness, and ask that it be marked as such.

(Whereupon, the document above referred to, marked Valley-6, for identification, was received in evidence.)

BY MR. KOHLMEYER:

Q Are you familiar with the tariff of the Mississippi Valley Barge Lines Company?

A Yes.

Q Do you know what rate will be applicable to this shipment if I were to give you a tariff?

A Yes.

Q I show you here a booklet marked "Valley-7", and ask you if you can identify this, just what this is, and explain it to the Court? (Document to witness.)

A Yes, this is our Mississippi Valley Barge Line Tariff by which we work, and from which we quote all rates for

transportation.

Q And that is Freight Tariff 25-C, I.C.C. 101, issued May 12, 1954, and effective June 15th, 1954, is that correct?

A That is correct.

Q Will you look in the tariff, please, and advise what rate is applicable on this contractors' equipment described in the bill of lading, moving from New Orleans to Cheatham Dam?

A Yes. (Viewing document.) As I recall, Cheatham Dam is intermediary to Nashville, and New Orleans to Nashville is the Rate Basis 339. The Rate Basis is 339, and the equipment is contractors' equipment, contractors outfits, and so forth, and is given a group rating, and then you turn back here to Rate Basis 339, under Group 4, and under Column "C" rates, with the lowest minimum you have of 300 tons, and the rate is $6.30 per net ton. That is subject to 15 per cent X-175 general increase and also 3 per cent transportation tax.

Q Is that the rate which is computed on the bill of lading which you have already identified?

A Yes, it is.

MR. KOHLMEYER:

I have no questions.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Mr. Watterson, do you know on what day the La Belle was delivered to the Coyle fleet here in New Orleans?

A Only from memory. I think it was approximately December 8th.

Q At that time wasn't the Coyle fleet also the Mississippi Valley Barge Line Company's fleet.

Q That is right.

Q It was one fleet?

A That is right.

Q Who was in charge of that fleet?

A Well, you might say our Terminal Superintendent was in charge, but we had a fleet man over there by the name of Pierce, Joseph Pierce, who watched the fleet and took care of cleaning up barges, and so forth.

Q Is Mr. Pierce here in Court?

A No.

MR. LEMLE:

He will be here tomorrow.

BY MR. DUNBAR:

Q Do you have any personal knowledge of where the barge was placed in the fleet across the river?

A No, I haven't.

Q Do you have any knowledge of what inspection, if any, was made of the barge across the river?

A I understand Mr. Pierce did inspect the barge.

Q But you have no personal knowledge?

A No.

Q Sir, you have mentioned that no bill of lading could be issued until you got the weight of the cargo, which was being

transported?

A Not only the weight, but also the cargo. We didn't know exactly what was on the barge, and we were waiting for the shippers to give us a list of what they had loaded on the barge, and also the weight of each piece of equipment.

Q In the course of your dealings, when you make arrangements with a customer to move a barge, do you commonly mention that the rate you are quoting them is your tariff rate?

A It is the only rate we can quote.

Q I know it is the only rate that you can quote, so don't you just generally quote them the rate without mentioning the source of the rate?

A We usually give them the tariff reference.

Q YOu say you usually give them the tariff reference?

A Yes.

Q You don't know whether that was done in this case or not?

A I didn't quote the rate. No, I don't.

Q At any place on your stationery is there any indication or words printed on the stationery which would indicate that you are certificated as a common carrier by water?

A On our regular stationery letterheads?

Q Yes?

A No, sir.

Q Is any mention made on your letterheads of the fact that you have filed a tariff with the Interstate Commerce Commission?

A No, sir.

Q How do you expect customers to know that you are certificated?

A Well, they have only to ask, if they want to know just what our rights are.

Q And unless they ask, they don't know what your rights are?

MR. KOHLMEYER:

I submit that that is a question of law, whether the customer has constructive notice of the fact that Valley is certificated or not, and actually Mr. Watterson couldn't know whether his customers know that or not.

MR. DUNBAR:

It probably is a question of law, but I think we should know the fact, I think, as to whether their customers were apprised of it.

THE COURT:

I think that you have developed that as far as you can develop it.

Let's proceed to something else.

MR. DUNBAR:

I have no questions.

MR. KOHLMEYER:

That is all.

BY THE COURT:

Q Do you make any shipments at all of any nature that are not on a tariff rate?

A. Yes. I would say yes, in the case of bulk liquids, unregulated, but we don't make those quotations from our office.

Q In other words, bulk liquids are not pursuant to tariff?

A No; the rates are not for them.

Q Is that because the Interstate Commerce Commission does not have any authority in that field?

A I would say, yes, because it is unregulated tonnage.

Q So all shipments that are made by Mississippi Valley, other than bulk liquids, are pursuant to tariff?

A That is correct, yes.

THE COURT:

That is all. Thank you.

MR. KOHLMEYER:

I would now like to call Mr. Pearson.

M. C. PEARSON

called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q What is your name, Mr. Pearson?

A M. C. Pearson.

Q And your position?

A Traffic Manager, Traffic Rating Division.

Q By whom are you employed?

A By the Mississippi Valley Barge Line Company.

Q Where?

A St. Louis, Missouri.

Q How long have you been Traffic Manager of the Rating Division?

A Since 1940.

Q What is your duty as Traffic Manager of Rates?

A The litigation and legislation of rates.

Q I show you here what purports to be a certified copy of a certificate issued by the Interstate Commerce Commission, which has been marked Valley-1, and ask you if you can identify it? (Document to witness.)

A Yes, I can.

Q Will you state what that is, please?

A That is a certificate and order issued by the Interstate Commerce Commission to the Mississippi Valley Barge Line Company, certificate of convenience and necessity.

Q What does it authorize?

A It authorizes the Mississippi Valley Barge Line to operate as a common carrier on specified waterways.

Q I show you here a copy of Freight Tariff 25-C, I.C.C. 101, effective June 15th, 1954, and ask you if you can identify that document? (Document to witness.)

A I can.

Q Who publishes it?

A It was published by myself, as tariffic manager, rates, and contains all of the rates of transportation of this company, which are enforced by the I.C.C.

MR. KOHLMEYER:

We offer in evidence this certificate, or, rather, certified copy of certificate marked Valley-1, and a copy of the tariff, marked Valley-7.

(Whereupon, the documents above referred to, marked Valley-1 and Valley-7 for identification, were received in evidence.)

BY MR. KOHLMEYER:

Q Will you describe briefly for the Court the nature of that tariff, Mr. Pearson?

A The tariff contains all of the rates, rules, and regulations which apply on common carriers, freight transported, by this company.

The title page reads thus: "Freight Tariff 25-C naming local and joint all water commodity rates in bargeloads, and rates for transporting empty barges between points in the various states." Shall I read the states?

Q No, that will be all right.

Generally speaking, where does Mississippi Valley run?

A It operates on the Ohio River, Mississippi River, Tennessee River, and Cumberland River, generally. And, of course, the Illinois waterway.

Q What sort of rates do you publish in that tariff?

A These are what are called bargeload rates. They publish rates on varying minima, 500, 400, 300, and in some cases 200, and also what we call A, B, and C rates.

Q Will you describe the difference between A, B, and C rates, please?

A A, B, and C rates are defined in Item 10, Column "A", thus: "A rates apply on shipments moving in barges furnished by Carrier, including full common carrier liability.

"Column B rates apply on shipments moving in barges furnished by Carrier, including only limited liability.

"Column C rates apply on shipments moving in barges furnished by Customer, including only limited liability." That is subject to other further items in the tariff.

Q. In the schedule of rates per ton shown in your tariff, are those three types of rates A, B, and C, available on all movements?

A No, they are not. The A rates are available in all movements. The B on some movements, and the C on some movements, but not on all.

Q Does the Mississippi Valley Barge Line Company transport any property other than under and pursuant to the terms of the tariff?

A Yes.

Q What property?

A Liquid bulk.

Q Why?

A Liquid bulk is exe pted by the statute, and is not subject to Interstate Commerce Act.

Q How about non-liquid--how about just packaged goods, may you --

A No, all packaged goods are regulated.

Q By whom?

A Subject to the I.C.C.

Q May you transport packaged goods not in accordance with the tariff?

A I don't believe I quite understand you.

Q I mean regulared commodities, may they be transported by Mississippi Valley other than under the tariff?

A No, sir.

Q Why not?

A Because the law regulates them. They are subject to the Interstate Commerce Commission Act, and under Section 306 of the Act we must publish all rates and rulings and regulations.

Q Was that tariff that you hold in your hand, marked Valley 7 the tariff in effect on December 10, 1954?

A Yes. It is still in effect.

Q Will you state to the Court, please, what is contained in Items 680, 690 and 700?

MR. DUNBAR:

I object to that question because I think all of the items speak for themselves.

MR. KOHLMEYER:

That is perfectly true, if the Court please. I thought it would be easier for your Honor to get it by him describing it to you.

THE COURT:

I overrule the objection.

THE WITNESS:

Item 680 is the fact of the straight bill of lading of this company.

Item 690 is the face of the order bill of lading, and Item 700 contains the contract terms and conditions which appear

on the reverse side of the bill of lading.

BY MR. KOHLMEYER:

Q Those are actually items contained in your tariff?

A Yes, they must be published under the I.C.C. Act.

Q Mr. Pearson, I show you here an exhibit marked Valley-8, and ask you if you can identify it and describe it to the Court? (Document to witness.)

A Yes, Valley-8 is a statement which was worked up under my supervision and direction, and shows the bargeload rates applicable on contractors' outfits by Mississippi Valley Barge Line in effect in December, 1954, from New Orleans to Cheatham Dam, Tennessee, and also to Smithland, Kentucky, which is at the mouth of the Cumberland River, where the Cumberland meets the Ohio. It shows the 500, 400, and 300 ton rates, and under Column C opposite Cheatham Dam is shown the figure 724.5, in other words, 724.5 cents, which is the rate published in this tariff, plus ex-parte 175 increase of 15 per cent, which was a general increase authorized the carriers by the I.C.C. It also shows the application of the A, B, and C. Rates.

MR. KOHLMEYER:

We offer in evidence the exhibit just identified by the witness, and mark it Valley-8.

(Whereupon, the document above referred to, marked Valley-8 for identification, was received in evidence.)

BY MR. KOHLMEYER:

Q Now, Mr. Pearson, will you state, please, what goes into

the making of a rate by Mississippi Valley?

A Well, in making our rates, of course, we must take into consideration the cost, and of course which includes all expenses, and plus a profit, plus a fair profit.

Q And does the question of insurance or liability enter into that rate structure?

A Yes, it does, as will be observed from the Exhibit-8, I believe it was. There is a difference between the A, B, and C rates. The B rates are lower than the A rates because of the difference in liability assumed by this company, which takes into consideration that the shipper-customer must purchase insurance if he wants it insured. Likewise, the "C" rates which apply in customers' barges, takes into consideration that the customer supplies the barge in which we transport the freight, and, of course, also furnishes his own insurance.

Q The tariff which you have identified, Mr. Pearson, has that tariff been filed with the I.C.C?

A Yes, sir. It is identified as I.C.C. 101.

Q Is there any rate contained in the tariff by which this shipment could have moved other than the one which you have identified in your testimony?

A No, there is no other rate that could be applied on it.

Q And that is the shipment on the La Belle, of course, that you are referring to?

A Yes, sir.

MR. KOHLMEYER:

That is all.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Sir, what movement does Item 710 entitled "Mississippi Valley Barge Line Company Towing Contract" apply?

A That would apply in so far as this tariff is concerned, only on empty barges transported by us.

Q You don't think that towing contract has any application to this movement?

A Definitely not.

MR. DUNBAR:

I have no more questions.

REDIRECT EXAMINATION

BY MR. KOHLMEYER:

Q Is there any rate quoted in your tariff for towage of contractors' equipment in barges?

A No, sir.

MR. KOHLMEYER:

That is all.

BY THE COURT:

Q By what authority do you run your liability under rates B and C?

A It is a matter of choice. We give the shipper the choice of either one. Under Rate A we choose to assume the liability; beyond that, under the B rate, and there is no particular authority, your Honor, I believe, that is, as far as I know, that would govern.

Q That is my understanding as well.

You say the difference is in connection with the insurance

Well, under the A rate, aren't you protected by the Harter Act?

A We have waived the benefits of the Harter Act.

Q Under "A" you waived the benefits of the Harter Act?

A Yes, we waived the benefits of the Harter Act under A.

THE COURT:

I have no further questions.

MR. KOHLMEYER:

If the Court please, of course, we will furnish you a copy, but I wonder if you would permit me to read that section, which is very short, in the tariff. Section 10 of the bill of lading provides: "Liability is assumed for all loss of, damage to, or expense in connection with the shipment (including, without limitation, loss, damage and expense due to fire, marine perils, and Acts of God); provided that no carrier shall be liable for loss of, damage to or expense in connection with or due to the delay in delivery of the shipment caused directly or indirectly by or resulting from or arising out of: The authority of law, the act or default of the shipper or owner, shrinkage, expansion or other change due to natural causes, any vice or defect in the shipment (including country damage to Cotton), insufficiency of package, the physical act of loading or unloading when not performed by carrier, or the acts of the public enemy, hostilities or warlike operations (whether or not there be a declaration of war) or any regulation or restriction omposed by authority of law, including, without limitation, quarantine and embargo; provided further that nothing herein contained shall impose liability on any carrier for an amount in excess of the declared value, if any.

of the shipment".

Then, section B: "Anything herein contained to the contrary notwithstanding, liability is assumed only for cargo safely aboard vessel when loading and/or discharging is not performed by carrier."

And in Section C: "In connection with the assumption of liability herein provided for, the carrier expressly waives the benefit of any protection, limitation of liability or exemption accorded it by the Harter Act (Act of February 13, 1893, 46 U.S. C. 190 et seq.) and the Limited Liability Act of March 23, 1951 (Revised Statutes 4281 et seq., 46 U.S.C. 181 et seq.) and all acts amendatory thereof and supplementary thereto."

In our "A" rate, so-called, we have assumed a greater liability, I presume, than an ordinary common carrier would assume; whereas, in the B and C rates that is not so.

THE COURT:

I have one more question.

BY THE COURT:

Q Is it shown in the rates in your tariff that the provision with reference to towage of barges relates only to empty barges? Is that shown in the tariff itself?

A The provision with respect to towage, yes, the rate on empty barges refers--Item 710 governs their transportation.

Q Does it relate to empty barges as distinguished from barges? Does it say "empty"?

A The Item 710 does not refer to any particular provisions in the tariff; however, the only rates that are governed by 710 are the empty barge rates which appear in Item--

Q But it says at the top, "with or without cargo laden thereon or therein upon the following terms and conditions;--"

A Yes, but as a matter of actual fact, there are no rates in this tariff on barges which contain cargo governed by that item.

Q I understand that, but it would be possible for you to make a rate outside of the tariff, according to Item 710.

A We would not make any rates.

Q What would keep you from making them?

A We are regulated by the I.C.C., and every rate must be in this tariff.

Q Why isn't there a rating under this Item 710 in the tariff?

A Item 710, your Honor, is a contract which we publish in this tariff, which is used only in connection with the rates shown in Item 5000 to 5040 of the tariff, which are covered barges empty, transported or afloat, which is on Page 96.

Q Well, was the towage of the La Belle, or rather, was the service rendered by Mississippi Valley with reference to the La Belle in this case, pursuant to Item 710?

A No, sir.

Q Why not?

A Because it was a shipment transported under the rates in Section 1 of our tariff, which are governed by the bill of lading's terms and conditions in Items 680, 690, and 700.

Q But it says here in 710, "Mississippi Valley Barge Line Company agrees to tow craft, with or without cargo laden thereon or therein, upon the following terms and condition--" Now, when

Mr. Walters called up Mississippi Valley and asked you then to tow these, or rather to service this barge, and this contractors' equipment, why don't you then place it under 710?

A There is no provision in the tariff which allows that. In other words, the only rate we have in this tariff, your Honor, on that equipment, and that barge, are "C" rates, published in Section 1 of our tariff, from New Orleans to Cheatham Dam. Such "C" rates are governed by Item 10, which says, "Column C rates apply on shipments moving in barges furnished by Customer. See Items 40, 490, 500 and 510."

Q Well, what is the purpose of having 710 in your tariff?

A That governs only the movement of barges.

Q Well, that was what this barge was, wasn't it?

A That was a barge loaded with cargo.

Q But this says that it covers cargo?

A However, it doesn't cover the cargo for all practical purposes. It has--the cargo means nothing in that contract, because there are no originating tariffs which are governed by those terms and conditions, which apply on cargo.

Q I still don't understand why 710 cannot be made applicable to the La Belle with cargo. I see nothing in 710 which would restrict it to other than the La Belle, and the cargo the La Belle had aboard?

A The tariff is affirmative in its application, and the rates--we must, on this particular movement, apply the rates on contractors' equipment, which were "C" rates. Therefor, they come under the application of Item 10, which sets forth the conditions under which we must transport the shipment.

Q But 710 is unlimited, and it doesn't say particularly barges, or particularly loads on barges, and it covers any barge with apparently any cargo. It would certainly seem to be unlimited.

In other words, my question is why don't you write this thing up under 710 instead of under other tariff provisions to which you and I have referred, and to which you referred when you prepared the bill of lading?

A The Item 710 as published in the tariff has no application except to the extent it is referred to.

Q Well, when would you use 710?

A In connection with the moving of empty barges only.

Q But it specifically says that it covers empty and loaded barges, in so many words.

A That is true, it does say that, but for all practical purposes it has no application on loaded barges in this tariff, because the loaded barges are governed by other sections of the tariff--the bills of lading terms and conditions.

Q All right, sir.

THE COURT:

That is all I have.

MR. DUNBAR:

Could I ask one more question, please?

BY MR. DUNBAR:

Q Sir, forgetting the fact that you are certificated by the Interstate Commerce Commission as a common carrier, would you consider this movement one of carriage or towage? I am talking

now in the traditional sense, if you were not certificated as a common carrier, what would this be?

A I would consider it carriage, transportation.

Q Even though the shipper furnished the barge?

A Yes, sir.

MR. DUNBAR:

That is all.

BY MR. KOHLMEYER:

Q Mr. Pearson, is there any rate quoted anywhere in the tariff for movement of cargoes in non-owned barges under 710?

A No, sir.

Q Is it possible then to quote a rate from your tariff for towage?

A No. Of course not.

MR. KOHLMEYER:

That is all.

BY THE COURT:

Q Is there any provision in the tariff showing a rate for towage of empty barges under 710 or any other section? In other words, is there any provision in the tariff showing the rate for the towage of empty barges?

A Yes, sir; on Page 96, Items 5000 to 5040, wherein we specifically provide in Rule 2 and Item 5040, "Above rates are subject to the terms and conditions of the towing contract as shown in Item 710."

Q And you say these are empty barges?

A Empty barges, yes, as you will observe from the top of the Item, "Barges empty, transported or afloat, rules and charges

therefor, see Items 5000 to 5040."

Q So you would call that a towage contract, and empty barge?

A It is subject to the towing contract as shown in Item 710.

Q Why wouldn't a barge loaded be subject to the towing contract under Item 710?

A Because there are no rates in this tariff published, except under the freighting section of this tariff, and in Column C rates we have no rates on contractors' equipment, except for transportation or carriage, as published in Section 1 of the tariff.

Q Am I to understand that even though you might style your charge under Item 710 a towage contract or towing contract, nevertheless the rate would be found in the tariff?

A Oh, yes. All rates are in this tariff.

Q Whether you style them common carriage or towage?

A It is always common carriage.

Q In other words, any carriage under the towing contract outlined in Item 710, the rates therefor are found in the tariff?

A That is right.

THE COURT:

That is all I have.

BY MR. KOHLMEYER:

Mr. Pearson, do you show any rates for exempt commodities in the tariff?

A No, sir.

Q Why not?

A Because there is no requirement. There are no requirements to show that in the tariff.

Q You are familiar generally with the tariffs of other river carriers?

A Yes.

Q Are their tariffs, more or less on the same structure as yours?

A Yes.

MR. DUNBAR:

I object to the question.

THE COURT:

He already answered the question "yes".

MR. KOHLMEYER:

That is all.

MR. DUNBAR:

No questions.

MR. KOHLMEYER:

If we put the master on now, he is going to be here a good while, and it would be probably more logical to put him on tomorrow morning, so with your permission, could we start taking them out of order and finishing them off?

THE COURT:

Very well.

MR. KOHLMEYER:

We will now call Mr. Lowder.

Office Supreme Court, U.S.
FILED
SEP 9 1957
JOHN T. FEY, Clerk

VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 195_

No. 446

MISSISSIPPI VALLEY BARGE LINE COMPANY,

Petitioner,

versus

T. L. JAMES & CO., INC., ET AL.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

TRANSCRIPT OF RECORD

UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT

No. 16469

MISSISSIPPI VALLEY BARGE LINE COMPANY

Appellant,

versus

T. L. JAMES & CO., INC., ET AL

Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

(ORIGINAL RECORD RECEIVED)

FILED: Jan 28, 1957
EDWARD W. WADSWORTH
Clerk

JOHN F. LOWDER: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q Mr. Lowder, where do you live?

A Cairo, Illinois.

Q What is your street address?

A 33rd and Bickford, Cairo.

Q Where were you employed in December, 1954?

A On the L. Wade Childress.

Q In what capacity?

A First mate.

Q What was your watch?

A 12:00 to 6:00.

Q How long had you been working on the Childress?

A Oh, about 2 years or better.

Q What sort of papers do you hold from the Coast Guard?

A Mate's papers.

Q How long haveyou been working on the river?

A Around 11 years.

Q Do you recall the tow that the Childress left New Orleans with on or about December 10th, 1954?

A Yes, sir.

Q Will you state what your duties were in connection with that tow?

A Making it up, putting wires fore and aft, and dressing it up, and so forth.

Q Where was the tow made up?

A Coyle's landing.

Q Where?

A Across the river over here in Algiers.

Q By whom was it made up?

A By myself.

Q At what time?

A From about 4:00 o'clock to 7:00.

Q That was on December 10th, 1954?

A Yes, sir.

Q Do you recall the Barge La Belle?

A Yes, sir.

Q Was that in the tow?

A Yes, sir.

Q Where was it placed in the tow?

A It was on the starboard side, on the head.

Q In what position was the barge towed; was she towed bow first or stern first?

A Bow first.

Q Was there sufficient wire and ratchets and other lashing material on board the Childress in order to make up the tow properly?

A Yes, sir.

Q How was the La Belle made fast to the next barge, do you recall?

A They had fore and aft wires, two on the stern, and they had two breast wires on it.

Q Did they have ratchets on it?

A Yes, sir.

Q Why did you use ratchets on those wires?

A To pull them, keep them close together.

Q Were you on the Childress when she departed from New Orleans that night?

A Yes, sir.

Q Were you on duty?

A Yes, sir.

Q Did she encounter untoward events while you were awake?

A No, sir.

Q Did she have any collision with any fixed or movable objects?

A No, sir.

Q Did her tow?

A No, sir.

Q What time did you go off watch?

A 6:00 in the morning.

Q On what date is that?

A That is the 11th.

Q How does it happen that you made up the tow at Coyle's?

A Well, I was on the after watch, and everything like that, and we got in about 4:00 o'clock, dropped our tow, and picked up a northbound tow, and I worked on to 6:00 the next morning.

Q Is it customary for you to make up the tow?

A Usually in port, yes.

Q Does the other mate assist you in that?

A Yes, he helps too.

Q So you work a double watch when you are in port in making up a tow, is that right?

A Yes, sir.

Q Did you have occasion to go out on the La Belle at any time during the voyage, after you left Coyle.

A Yes, I usually check the barges, and so forth, for water, and stuff like that.

Q Did you check the La Belle?

A Yes, sir.

Q What time was that?

A Around 2:00 o'clock in the morning.

Q What time had you gone on your watch?

A Sir?

Q Had you gone on your watch at midnight?

A I had been up since 12:00 the following day.

Q And you checked her at 2:00 o'clock in the morning?

A Yes, sir.

Q On the morning of the 11th, is that right?

A Yes, sir.

Q And what did you find on your check?

A I found she had a little water in it.

Q Where?

A In the hatch out there.

Q How many hatches did you check.

A All I could see is two.

Q Were there other hatches on the boat?

A If there was, I didn't see none.

Q Why?

A I guess it was covered up, or something.

Q Do you recall what sort of equipment was on the barge?

A Yes.

Q What was it?

A Bulldozers, and some trucks, and a couple of cranes.

Q And were they sitting on the deck of the barge or sitting on something else?

A They were on timbers.

Q On what?

A Timbers.

Q And you saw only two hatch covers on the deck?

A That is right.

Q That you could get to, is that correct?

A That is right.

Q Were they forward or aft?

A They were forward.

Q When you checked the hatch covers did you check the port or starboard hatch?

A I checked them both, but the starboard one I put the pump in. I put the pump in the starboard one.

Q But before you got that far, you checked both of them?

A Yes, sir.

Q What was the amount of water in each?

A I figured around a foot and a half, or maybe two feet.

Q In each one of the compartments?

A Yes, sir.

Q Was it a different level in the two compartments?

A No, both about the same.

Q What did you do after you found the water?

A I put a pump in it.

Q What kind of pump?

A An electric pump.

Q Where did that come from?

A I got it off the boat.

Q What boat?

A The Childress.

Q What size pump was it?

A A three inch pump.

Q Who assisted you in putting the pump on, if anyone?

A The deckhand.

Q What was his name, do you recall?

A Well, I think Mosley is one.

Q Did you start the pump yourself?

A Yes, sir.

Q Did you see it pumping?

A Yes, sir.

Q How long did you let it go?

A Well, I pumped it and everything like that, and then I went back out and checked the barge again later, later on.

Q About what time?

A Around 3:00, I guess, and I put the pump--the pump wasn't pumping completely over the barge, you know, and the water was kind of running a little back in the hatch, so I got a three inch hose and put it where she would go over the side.

Q And where did the water then discharge?

A Over in the river.

Q What side was that?

A The starboard side.

Q When did you look at it again?

A 5:00 o'clock.

Q What time?

A About 5:00.

Q What did you find then?

A The water was coming out of it. The barge was coming dry, and that pump was taking the water out of the barge.

Q In other words, she had less water in there then than she had when you started the pump?

A That is right.

Q About how much water would you say was then in it?

A Approximately a foot.

Q What time did you go off duty then?

A 6:00 o'clock.

Q Did you make any report of this condition to the master or to the relief mate or pilot?

A I told the second mate that I had a pump running in the La Belle?

Q Who was the second mate?

A Arthur Turner.

Q And what was his duties?

A He was second under me. He worked the forward watch, 6:00 to 12:00 watch.

Q In other words, he relieved you?

A That is right.

Q During his watch he had the same duties that you had during your watch?

A That is correct.

Q What did you do then?

A I went to bed--I ate and went to bed.

Q What time did you get up the next morning?

A 11:30.

Q What did you do when you got up?

A I washed and went down and ate.

Q Did anything unusual happen then?

A Yes, sir. The captain blowed for the second mate, and he went up to the pilothouse, and I was going to relieve him, and I was a little early, and he told me, he said to check the La Belle barge out there.

Q The captain blew for the mate? Is that what you said?

A Yes, sir.

Q Well, what did you mean by that?

A Well, you've got one whistle when you want the mate, you see.

Q And that is your regular signal for the mate to come to the pilothouse?

A Yes, sir.

Q And did you check or examine the La Belle?

A Yes, sir.

Q When you got out there what did you find?

A I found the La Belle low on the head.

Q How low?

A Well, I would say it was approximately a foot out of the water.

Q Was she plunging her head in the river?

A Yes.

Q Was water washing over the deck?

A Not at that time, no.

Q At the time you went on there the night before, at 2:00 o'clock, was water washing over the deck?

A No, sir.

Q How much freeboard would you say she had at the bow, on the night before, I mean?

A Around three feet.

Q And how much would you say she had when you went out there the next day at noon?

A About a foot, approximately a foot.

Q What did you do when you got there?

A I plugged the pump in, the electric pump.

Q What else happened then?

A The captain and I went back and got another pump, and I put another pump in there.

Q What sort of pump was that?

A A gasoline pump.

Q How big?

A A two inch pump.

Q And you started that pump?

A Yes, sir.

Q Did it work?

A Yes, sir.

Q And then what happened?

A The captain gave me order to top the barge around, and I topped it around, and ran it on the side of the barge Valley Square.

Q What do you mean that you topped it around?

A Well, you've got to swing it around, and you put a line on the stern, and she tops around that way (indicating with hands), and you bring it around the way you want it.

Q Did you finish topping her around?

A Yes, sir.

Q Where were you at the time?

a I was on the--I had a hold of the line.

Q And who was with you?

A One of the deckhands, I imagine.

Q Where were you standing, Lowder?

A I was standing on the Valley Square, on the head of the Valley Square.

Q Do you recall the number of that barge by any chance?

A I believe it was 112.

Q Was she loaded or empty?

A Loaded.

Q What type of barge is she?

A She is a 132 x 35.

Q Is it a hopper?

A A cover top.

Q Was the La Belle made fast to the 112 after she had been topped around?

A Yes, sir.

Q With what?

A With grass lines, Manila lines.

Q And you, or someone directly under your supervision made those lines fast?

A Yes, sir.

Q And then what happened?

A Well, they plugged the electric pump back in, and the other pump was still going, the gasoline pump, and the barge just kept going on down, and everything.

Q Well, why had you turned the electric pump off?

A Well, I had to because you've got to have your cord hooked up on it.

Q Well, what sort of electricity does that pump use?

A D.C.

Q From where?

A From the boat.

Q So you had to have a wire running out to the pump, is that right?

A That is right.

Q And when the barge was swung around you had to unplug the pump until you could get back?

A Yes, sir.

Q And you plugged the pump back in again?

A Yes, sir.

Q Was the gasoline pump running?

A Yes, sir.

Q Did it ever stop?

A No, sir.

Q And then what happened, Lowder? What happened after she had been topped around and you made her fast?

A Well, I pumped for a while and everything, and it looked like the barge just--well, she just went on down, and that is the only thing I can say, the barge did.

Q What happened to the equipment?

A Well, the equipment started sliding, and so forth before, and she got down so far and the equipment started sliding.

Q Which way did the equipment slide?

A I don't know. I was running.

Q Did the barge careen over to the side? In other words, did the barge careen over to the side?

A I imagine it did. I don't know.

Q You didn't see that?

A I didn't see that. I was running.

Q Did the line hold?

A No, sir.

Q What is the next time you saw the barge?

A I ain't never seen it since.

Q Well, after that?

A After that I seen it kind of floating out there a few minutes, but she went on down.

Q In what position was she when you saw her kind of floating out there?

A I think she'd turned over.

Q Was she parallel to the water or sideways, or up and down, or what?

A The bow end was kind of down.

THE COURT:

You mean still on the bottom, the bow end was down but still on the bottom? Did she turn completely over?

THE WITNESS:

Yes, she turned over.

THE COURT:

I see. And then her bow was down on the side?

THE WITNESS:

Yes, sir.

THE COURT:

As I understand it, she was down and it looked like with her nose to the bottom?

THE WITNESS:

That is right, yes. That is the way I seen it, the way I remember, anyway.

MR. KOHLMEYER:

We have another witness who actually saw it, who can describe the position of it.

BY MR. KOHLMEYER:

Q Lowder, when you went out on that barge at 2:00 A.M. for the first time, that was the first time you had gone out there on your night watch, was it not?

A I had been out there on the tow all night.

Q All night?

A Yes, making the barges up, you see.

Q Had you been on the deck of the La Belle before 2:00

o'clock in the morning?

A Yes, I wired it up out there.

Q Was the Childress under way at the time?

A Yes.

Q Was her tow made up, as it was, at Coyle's?

A Yes, sir.

Q Do you know whether or not she was coming full ahead?

A Yes, that is the usually--she usually comes full ahead.

Q Was there any water at all on the deck of the La Belle when you were out there?

A No, sir.

Q You are certain of that?

A That is right.

Q When you went back down on the La Belle at 5:00 o'clock was there any water on the deck of the La Belle?

A No, sir.

Q You are positive of that?

A That is right.

Q Now, when you went out there on the next watch, or just at the beginning of your watch at about 11:45 or noon, on the 11th, was there any water on the deck?

A It was just a little spray coming over on the ramp.

Q The deck was not awash?

A No, sir.

Q Did the water extend further up on the La Belle than the end of the ramp?

A Sir?

Q Did the water come up any further on the La Belle than

the end of the ramp?

A No, sir.

Q It was not washing over the entire deck?

A No, sir.

Q You are certain of that?

A Yes, sir.

MR. KOHLMEYER:

That is all. Answer Mr. Dunbar's questions. Excuse me I have a couple or more questions?

BY MR. KOHLMEYER:

Q Mr. Lowder, I show you a picture which I marked Grant-8, and ask you if you can identify that as the deck of the La Belle? (Photograph to witness.)

A Yes, that kind of ramp, and everything, but I never seen that many hatches before.

Q Do you recall whether or not that type of hatch and type of hatch cover is the sort of hatch and hatch cover that you saw that day?

A That is right. One of them, it is here, and I didn't see but two altogether. (Indicating on photograph.)

MR. KOHLMEYER:

That is all.

CROSS EXAMINATION

BY MR.DUNBAR:

Q Mr. Lowder, when did you first see the Barge La Belle?

A Over here at the Coyle landing.

Q What time of the day was that?

A We started making the tow over there around 4:00 o'clock in the afternoon.

Q What was the condition of the barge at that time?

A The barge looked okeh.

Q Was it on even trim?

A Yes, I figured it was.

Q Where all of the hatches covered?

A I didn't see but two when I checked it.

Q Which check are you referring to now? Did you inspect it when you were making up the tow?

A No, sir.

Q You did not inspect it at all?

A Not at that time.

Q Now, why do you say that you could see only two hatches?

A That was when I did check it.

Q You're talking now about your later on check?

A All I done was wire it up in the tow at that time, you see.

Q At the time you incorporated it in the tow no inspection was made of the barge, is that right?

A No, sir. No inspection was made of the barge--that was when we just picked it up.

Q At the time you incorporated it in your tow?

A Yes, I checked it.

Q What did that check consist of?

A Well, it was two hatches on it.

Q Did you go into the holds?

A No, I didn't go into them. I just shined my light down there and I seen the water in it, and I started pumping the barge.

THE COURT:

Was this when you made up the tow?

THE WITNESS:

That was after 2:00 o'clock in the morning, when I checked the barge.

BY MR. DUNBAR:

Q What I would like to know, and I don't think you have understood my question, what inspection, if any, was made of the barge at the time you incorporated it in the tow originally back at Coyle's?

A I just wired it up, and that was all.

Q In other words, no inspection was made?

A No, sir.

Q And it was on even trim?

A Yes, sir.

Q You say that it was on even trim?

A That is right.

Q Did you use your discretion concerning how to make that tow up, or did anybody just give you instructions?

A Usually the captain and myself go over the tow.

Q But on this particular case did you use your own discretion, or did the captain or someone else give you instructions?

A The captain and myself went over the tow plans.

Q Who participated in the making up of the tow?

A What do you mean "participated"?

Q Well, who else besides yourself was down on the barges deciding where to put the various barges?

A Me and the captain.

Q Did anybody from Valley's office come down and assist you?

A Well, usually the--Hughes, I believe is what they call him, this what's his name--

THE COURT:

Is it the watchman?

THE WITNESS:

No, sir. A company man, but I don't know what his name is, he usually comes down when each boat comes in.

BY MR. DUNBAR:

Q Did he on this occasion come down?

A I don't remember.

Q You don't remember.

A That is right.

Q So Captain Powell and yourself made up the tow?

A That is right.

Q Do you know whether Captain Powell inspected this barge?

A Well, no, he stays in the wheelhouse.

Q What does he do from the wheelhouse?

A He handles the boat.

Q And you were the one down on the barges deciding where to place them in the tow?

A You do that up in the wheelhouse.

Q Who decided where to place the La Belle in this particular tow?

A Myself and the captain.

Q Do you know what the overall length of your tow was?

A No, I really don't.

Q Do you know what the overall breadth of the tow was?

A No, sir.

Q Will you explain exactly how the La Belle was made up to the remainder of the tow?

A We had two breast wires on the head and one on the timberheads, and one on the tow, and two fore and aft wires.

Q Where did the lines on the head run to?

A The lines? We had wires on it.

Q Where did they run to?

A They run to the timberhead over there, and one to the cavel.

Q What barge was directly to port of the La Belle?

A Well, I believe it was Valley Jumbo barge.

Q Do you know the dimensions of that barge?

A No, I don't.

Q Was it loaded or was it light?

A It was loaded.

Q But you don't know its dimensions?

A No, sir. It's been so long that I don't recall it.

Q What type barge was it?

A I don't remember.

Q Was it a deck cargo barge, or--

A Yes, it was a barge, and that is all I know.

Q Do you remember what barge was directly behind the La Belle in this starboard string?

A That is right, it was a Valley Square.

Q A what?

A Valley Square.

Q What were the dimensions of that barge?

A 132 x 35.

Q That is a much larger barge than the La Belle, isn't it?

A Well, around the same.

Q Was it loaded or was it light?

A It was loaded.

Q What was it loaded with?

A I don't know.

Q After the La Belle's tow was made up, could you see the deck of the La Belle itself from the pilothouse?

A Yes, sir.

Q From the pilothouse you could see the deck of the LaBelle?

A Oh, no, not the whole deck, because you had it covered, the top of the barge, but you could see the La Belle barge with equipment on it, and stuff like that.

Q Well, just what could you see?

A The fact of the business is that I was working all during the night, and I wasn't in the wheelhouse all night, anyway. I was working.

Q I thought that you had the midnight to 6:00 A.M. watch?

A That is right, I do.

Q And you don't stand any of your watch in the pilothouse?

A When there ain't nothing to do, I do, but I was wiring the tow up.

Q When did you get underway?

A 7:00 o'clock, It was around 7:00 o'clock.

Q Were you in the pilothouse between midnight and 6:00 A.M.?

A Well, I imagine I was maybe putting carbon in the searchlight, but I had other things to do--putting wires on and so forth.

Q Who was there in the pilothouse, in charge of the vessel, from midnight?

A The pilot was.

Q Who was that?

A Gentry Lowe.

Q Gentry who?

A Gentry Lowe.

Q You don't stand a watch at the wheel, do you?

A No.

Q Did you say that the La Belle was being towed bow first or stern first?

A I assumed it was bow first.

Q Are you certain about that?

A That is right. I reckon it was, because it had the pointed end with that ramp on it, kind of pointed in like that (indicating with hands), coming out like that.

Q The end with the ramp on it was being pushed ahead?

A That is right.

Q You mentioned that you checked the La Belle at 2:00 A.M.?

A That is right.

Q Did you check it at any time after it left before 2:00 A.M.?

A No, sir.

Q That was the first check that you made of it?

A That is right.

Q Did anybody else check it?

A No, sir.

Q In other words, that was the first time that anybody had looked at the barge?

A That is right.

Q Exactly what did that check consist of?

A Well, water in the barge.

Q You looked in the hatches and saw water in the barge?

A That is right.

Q You mentioned that you only saw two hatches. Did you look for anymore hatches?

A That's right, I couldn't see none.

Q The reason you couldn't see any more was because it was dark, or you don't think there were any?

A Well, the way I looked for them, I couldn't see none. I had a flashlight, and everything.

Q With what kind of hatches and hatch covers was the La Belle equipped?

A It was more or less right on a flat, and everything like that, and it had a little angle iron around the hatch cover on there.

Q It did have an angle iron around the hatch?

A That is the best of my knowledge at the time, yes.

Q And you couldn't find but two hatches?

A That is all.

Q Did you go down into the hatches?

A No, sir.

Q How did you determine there was a foot and a half of water in it?

A I just mentioned that that was how much, the way the pump and everything like that was, when I went down in the water, and so forth.

Q After you found a foot and a half of water in those two hatches, did you look pretty carefully for other hatches?

A Well, I couldn't say--I had looked before.

Q I mean after you determined that there was this water in the two hatches, did you look again to see if you could find some other hatches?

A I didn't look back, there was no use to looking twice.

Q But you didn't look again?

A No, sir.

Q Even though there was water in the two that you could find?

A That is right. There was no use to looking twice.

Q Now, you mentioned that you put a pump on the barge of the La Belle at approximately 2:00 A.M., after you discovered the water?

A That is right.

Q And that was an electric pump?

A Yes, sir.

Q What was the capacity of the pump?

A What do you mean "capacity"?

Q Well, how much water could it pump out?

A I don't know, sir.

Q Is that the only pump that you had on the La Belle?

A No, we had another one later on, the next day.

Q How many pumps did you have on the vessel?

A Well, let me see--we have two, four pumps.

Q Which of the two hatches did you put the pump in?

A The one on the starboard side.

Q Why did you do that?

A Because it had water in it.

Q You have mentioned that the other one had water in it also, and did you--

A It had water in it too, yes.

Q Well, did you put a pump in the hatch on the port side?

A No, sir.

Q Why didn't you?

A Well, it drained across.

Q How do you know that it was draining across?

A I would see it.

Q And it didn't occur to you to put a pump on the other hatch?

A That is right.

Q At the time that you noticed the La Belle was taking on

water at 2:00 A.M., did you call the captain, the pilot?

A No, sir.

Q Who did you tell about it?

A I told the second mate, at 6:00 in the morning.

Q You didn't tell anybody that the barge was taking on water in the period from 2:00 A.M. until 6:00 A.M.?

A Well, the deckhands, me and the deckhands out there, three deckhands.

Q You and the three deckhands were the only people that knew about it?

A That is right.

Q You mentioned that you went back at 3:00 A.M.?

A That is right.

Q And inspected the barge again?

A That is right.

Q Did you leave anybody out on the barge in the period from 2:00 A.M., to 3:00 A.M.?

A No, sir.

Q You didn't mention to anybody in the pilothouse that the barge was taking on water?

A No, sir.

Q What was your answer?

A I said no, sir.

Q And you went back the second time at 5:00 A.M., is that correct?

A That is right.

Q Did you leave anybody on the barge in the period from

3:00 A.M., to 5:00 A.M.?

A No, sir.

Q I believe you testified that at 6:00 A.M., when you went off watch, you did tell the second mate that the barge was taking on water?

A That is right--it wasn't talking on water, but that I had a pump in it. I didn't tell him that it was taking on water. I said that I had a pump in the barge, pumping out there.

Q Do you know whether he kept the pump in the barge after you went to bed?

A That is right. The pump was in the barge.

Q When you went back out to the head of the tow at 11:45, after the pilot had blown for you, you testified that you put a pump back in?

A The pilot didn't blow for me. He blowed for the second mate, the captain did, and I met the second mate coming down from the wheelhouse. He said, "Check the La Belle barge."

Q And you did?

A That is right.

Q What did you find at that time?

A The barge on the head was low, and everything.

Q Was any pumps pumping in either of the two hatches?

A No, sir.

Q There were no pumps in either of the two hatches?

A No, sir.

Q There were no pumps in either of the two hatches?

A There was a pump setting in there, electric pump, but it

wasn't plugged up.

Q So at some time between 6:00 A.M. in the morning and the time you returned to the head of the tow, they stopped pumping?

A That is right.

Q When you got out there were there any deckhands standing by?

A Well, I don't recall. I don't think so.

Q Will you describe the second pump that you went and got?

A It was a two inch gasoline pump. It was one of those Homelite pumps.

Q Was it a larger or a smaller pump?

A It was a smaller pump than the three inch pump.

Q You testified that you had four pumps? Could you describe the other two pumps?

A Well, we've got another electric pump, and then we've got a four inch pump.

Q When you returned to the head of the tow and found the barge down by the head, did you then make an effort to find some of the other hatches to put the other additional pumps to use?

A I plugged the pump in when I went out there.

Q I know you used two pumps, but did you make any effort to put two more pumps to use?

A I went back to the boat and got this other gasoline pump.

Q That was the second one?

A That is right.

Q Did you make any effort to use the third or fourth?

A It wasn't necessary to get any more pumps.

Q Why do you say that?

A Them pumps are heavy. You can't move them like moving, like walking them, or something.

Q Had you or anybody else thought to bring those pumps to the vicinity of the barge prior to this occasion?

A No, sir.

Q So it would have been necessary to go get them?

A Well, I didn't figure the barge was in danger, or anything like that.

Q How much time would you say elapsed between the time you returned to the head of the tow and the barge careened and lost its cargo?

A Oh, I would judge approximately thirty minutes, or maybe longer--maybe probably an hour. I don't know. I didn't look at no watch or clock, or nothing.

Q Where in the river was the tow when you returned and found the barge down by the head?

A It was in Plaquemine, up here.

Q Where did the casualty occur?

A At Plaquemine.

Q After the barge was determined to be down by the head, did the Childress come on ahead, or did she stop?

A No, sir.

Q When you say "No, sir," what do you mean?

A I said, "No, sir."

Q She stopped?

A That is right.

Q So that explains why you were there for forty-five minute approximately?

A We topped the barge around in all that length of time, you see.

Q Was any effort made to ground the barge?

A That is right.

Q Why weren't you able to do that?

A There was a lot of water down there.

Q During that entire forty-five minute period nobody attempted to use the other two pumps?

A No, sir.

Q How long would it take to get the other two pumps?

A It might not have been that long--I don't know--it happene so quick, and everything like that, that I just don't know how long it took.

Q Well, how long would it have taken to get the two pumps that were not used?

A I'd gotten one back there, and it would probably take--you couldn't get it out there within twenty minutes, hardly; and the other one,you probably--it wouldn't take, oh,probably twenty minutes, or thirty minutes, something like that.

Q Why would it take twenty to thirty minutes? Is it heavy so that you can't carry it out?

A It is heavy, and it is back on the boat.

Q As a practical matter,how would you bring it to the head of the tow? Couldn't the men carry it?

A That is right.

Q Well, how many men would it take to carry it?

A It doesn't take but about three.

Q And it would take twenty minutes to carry it?

A You've got to walk back, and so forth, like that.

Q On the trip up the river was a lookout being maintained at the head of your tow?

A No, sir.

Q Do you regularly keep a lookout?

A No, sir.

Q Did the fact that the barge had water in it result in any special attention being given it, other than the fact that you checked it every several hours?

A I went out three times and checked it, after I found out there was water in it.

Q But other than those checks, nothing else was done?

A What do you mean "Nothing else was done"?

Q You didn't leave a man on there standing by, did you?

A No, I didn't think it was necessary. It was pumping out.

Q Whenever you have a barge in your tow that is taking on water, do you customarily just put a pump in there and leave it?

A Well, if you think it is in danger, you watch it, yes, and so forth.

Q Don't you think that a barge is inherently in some danger, at least, when she is taking on some water and has water in it?

A All I know was that the barge had water in it, and I was pumping it, and I kept a check on it. I didn't know if it was leaking, or what..

Q What regular inspections of the tow are made under such circumstances?

A You usually do it every time you come on watch, or during that six hours.

Q So it was just chance that you made the 2:00 A.M. inspection?

A No, I was working on the tow, and everything like that, and then I had to check my barges, and so forth. That is a routine check. You check your barges every six hours.

Q About how much?

A Every six hours, whenyou come on watch.

Q And you didn't assign any deckhand or any other person to make more regular inspections, even though you knew the barge was taking on water?

A I didn't think it was necessary, no.

Q You never went down into the holds?

A No, sir.

Q Do you know when the last inspection of that barge was made prior to the accident?

A No, I don't.

Q You were asleep?

A That is right.

Q When you went up on deck and went to the head of the tow, had the Childress already stopped,or was she still proceeding ahead?

A She was stopped. As far as I know, at that time, I think she was stopped. I don't recall if it was or wasn't--I just

don't know about that.

Q Where, in relation to the bank of the river was the tow?

A She was right there close to that ferry landing.

Q The Plaquemine Ferry Landing?

A Yes, sir.

Q Isn't true that the water on the right ascending, off the right ascending bank of the river, is shallow in the vicinity of Plaquemine Ferry?

A I don't know.

Q You don't know.

A I don't know.

Q Did the captain or anybody else blow an emergency signal to get additional crew members on deck, or were you just using the people on watch?

A Using the people on watch.

Q People who were not on watch were never summond?

A No, sir. As far as I know they wasn't. There was a couple of others out there, yes.

Q How many people did you have on watch at the time of the casualty?

A Four of us.

Q And who were they?

A Myself and three deckhands.

Q And I assume somebody in the engine room?

A I don't know. I was busy, and everything like that, and I didn't keep count of that.

Q So that you and three deckhands tried to do this whole

job yourselves?

A No, the captain come out there. He gave me orders to top the barge around.

Q Did anybody else assist you?

A No. Fats Turner, he was out there at the time, Arthur Turner, after he hit.

Q But the entire crew was not turned out?

A No.

Q Why was that?

A Don't ask me. What could they do? It happened so quick.

Q Couldn't they have brought the other two pumps up?

A How can you carry a four inch pump?

Q You say it happened so quick, but I thought that your testimony was that that was forthy-five minutes, approximately?

A I don't know how long. The forty-five minutes--I just said forty-five minutes, but it might have been twenty minutes, or thirty. I was working, and I don't know. I didn't have no watch to look at my watch, or anything like that. I had something to do.

Q Is there any emergency apparatus, sound signal system, on the ship where the men in the pilothouse can summon members of the crew in an emergency?

A That is right.

Q Well, would you have heard it if it had been sounded?

A I don't imagine I could have.

Q But if it had been sounded, chances are that somebody would have shown up?

A I don't know. They probably would, yes.

Q What were the names of the three deckhands that assisted you?

A Mr. Mosley is one, and I don't remember the others' names. They have so many deckhands on there--

Q Did you happen to notice whether they were present in Court this morning?

A I don't know. Mosley is, but I don't know the others, and I don't even know who was in there.

Q But you are certain that not more than three men, three deckhands, were on watch?

A That is right, three deckhands, that is all we got on watch. Just three deckhands on watch.

Q How long were you on the Childress after this happened?

A I don't know, after I got off on time.

Q Did you return to the Childress or some other vessel?

A I returned to the Childress.

Q How long did those two deckhands stay aboard the Childress?

A Well, I don't know. It has been so long that I don't recall how long they stayed on there.

Q Do you know where they are how?

A There is one of them in there (indicating). I don't remember who the other two was. It's been so long ago.

Q How far was the barge from the bank when it actually sunk?

A It wasn't--I don't know. I'm a poor judge on distances, and I really--well, approximately it was a couple of hundred feet, something like that.

Q Do you know whether the pilot was attempting to essentially pump out of the barge, or was he trying to ground it?

A He was trying to ground it and pump it out too.

Q Do you know where he was trying to ground it?

A No, that wasn't none of my -- he was out there in the wheelhouse, and I was out there trying to take care of the barges as much as possible.

Q Now, did the barge have a list when you returned to the head of the tow at 11:45?

A No.

Q Was it down by the head?

A That was all.

Q Where do the three deckhands ordinarily stand their watch?

A Well, if you ain't got nothing to do, they stay back on the boat. If you got work for them, they help you out on the tow.

Q Isn't it true that as a practical matter they stay in the galley unless they are summoned?

A That is right.

Q And they were available?

A They check the lights a couple of times a watch.

Q And if you had seen fit you could have assigned one to stand by?

A That is right, if I had figured it was necessary.

Q What speed was the La Belle proceeding at at least during your part of the watch?

A I don't know. I don't know the mileage of -- well, I don't know how fast we were going because we don't keep up with that.

Q Well, just approximately?

A I don't know.

Q Was it five or ten miles?

A I don't know. I don't know how fast. I didn't have no speedometer.

Q At any time on the trip up the river did you feel any thud or jolt to indicate that your tug had hit anything?

A No, I didn't.

Q Do you have anything to do with the keeping of the log of the Childress?

A No.

Q Did you make any notes about this casualty after it occurred?

A What do you mean "notes"?

Q Did you jot down what happened on a piece of paper, or--

A No.

Q Did you notice the current in the river in the vicinity of Plaquemine Locks on that day?

A No, sir.

Q Now, sir, you mentioned that approximately forty-five minutes or later -- you indicated that it might have been less -- but --

A It might have been more or less, and I didn't have no clock. It was working, and everything like that.

Q Well, I understand that from the time you went to the head of the tow until the time the barge was lost, when was the first time that you actually felt the barge was in danger of sinking?

A After we done topped it around and the pump was pumping, and so forth.

Q You didn't think there was any danger of its sinking before then?

A No, sir.

Q When was that in relation to the time that it was loaded? How much time elapsed between the time you realized it was in danger of sinking and the time it was loaded?

A When the stern got to getting lower and lower, and everything like that, we started to beaching it, and everything.

Q How much time elapsed? How much time elapsed between the time that you thought there was some danger that the barge might sink, and the time it actually did?

A It wasn't long. It wasn't long, but I wouldn't know how many minutes, or nothing like that.

Q Was the pilot actually trying to ground the barge before then?

A He didn't think it was necessary. I don't reckon he did.

Q Did you send somebody up and tell him he had better ground it, or did he make that decision in the pilothouse himself?

A The captain did.

Q In other words, at no time did you report the condition of the barge tohim?

A He knew the condition.

Q How did he know?

A The captain had been up there and told him.

Q When you say, "the captain," who are you referring to?

A The master of the vessel.

Q What is his name?

A Powell.

Q And how did he find out that she was down by the head?

A Well, he was out there.

Q When did he get out there?

A He got out there--he gave me orders to top it around.

Q Do you know whether he made any efforts to find other hatches?

A I didn't know. I didn't ask him.

MR. DUNBAR:

I have no further questions.

REDIRECT EXAMINATION

BY MR. KOHLMEYER:

Q How was the weather at the time?

A It was fair.

Q Was there any fog?

A No, sir.

Q Any rain?

A No, sir.

Q Or wind?

A No, sir.

Q Is it unusual for you to have a barge that was water on a trip?

A Well, yes--

Q How many times would you say it happens in a trip that you have to pump a barge out?

A Well, quite a few times that you pump a barge out.

Q When you have to pump a barge out, do you generally report it to the master?

A No, sir, unless I think it is in a dangerous condition, or something like that, and then I do.

Q Well, do you ever use that four inch pump to pump out a barge?

A Well, I never used it.

Q How much does that weigh, approximately?

A Well, four or five hundred pounds, I imagine.

Q All in one piece?

A Yes. The hose weighs about two hundred, I guess.

THE COURT:

I would like to get this time straightened out, if I can. When did the tow leave? What time did it leave?

THE WITNESS:

Approximately at 7:00 o'clock.

BY THE COURT:

Q In the morning?

A At night.

Q And then it was 2:00 A.M. that you first noticed that the barge had water in it?

A Yes, sir.

Q In the two hatches?

A Yes, sir.

Q As I understand it, one hatch was on the starboard, and one hatch was on the port side?

A Yes, sir; they weren't very far apart.

Q Were both hatches on the starboard side of the vessel?

A No, sir, they were straight across.

Q But one was on port and one was on starboard side?

A That is right.

Q At that time was the barge still in trim, or did she seem to be down by the bow, listing, or something?

A No, sir.

Q She seemed to be in trim at that time?

A Yes, sir.

Q But you didn't notice the water?

A That is right.

Q At 3:00 o'clock you made another check, and it appeared you were not making too much headway because the water was washing back in?

A Yes, sir.

Q And then you attached a hose on the outlet, and then did you make headway against the water?

A That is right. Yes, sir.

Q And at the time did you check it again between 3:00 A.M. and the time that you left the watch at 6:00?

A That is right, at 5:00 o'clock I checked it.

Q And she was all right. She was making headway?

A That is right.

Q So when you left you had this electric pump still pumping, when you went off watch?

A That is right.

Q And she was making headway at the time, as far as you could see?

A That is right.

Q And then your next connection with it was around noon, 11:45 the next day, whenyou were about to come on watch?

A Yes, sir.

Q At this time, when you went up there the pump was not running, and somebody had unplugged it?

A That is right.

Q But at this time also the barge was down by the head?

A Yes, it was down.

Q Did you look in the hatch to see how much water she had?

A No, I just plugged the pump in.

Q Just plugged the pump?

A Yes, sir.

Q And then how long was it before you received orders from the master to top the barge?

A It was five or ten minutes, I guess.

Q And then you topped it?

A That is right, he told me to top it.

Q So you pulled the plug again, but you stated that you had another pump in there? In other words, one pump was operating all the time you were topping?

A That is right.

Q And you just pulled the plug on the electric pump?

A That is right.

Q How did you make up the La Belle to the balance of the tow after you topped her?

A Well, on Manila lines, the tow line and back line.

Q You didn't use any cable?

A No, sir.

Q And no ratchets this time?

A No, sir.

Q And the tow was stopped while you were topping her, or at least, when you started to do the topping, anyway?

A Yes, sir.

Q And after you had her made fast in her new position, the tow started again?

A No, sir.

Q It stopped? It was still at the same place?

A Yes, sir.

Q Did you stay on near the tug then from that time until it sank?

A No, I was out there by the barge.

Q I mean did you stay on the barge then until the time it sank?

A Yes, sir.

Q From about noon until the time it sank you stayed up there?

A Yes, I was watching her.

Q During that time did you check the water in any of the holds again?

A No, the pump was pumping and all in the two hatches, and everything, I guess.

Q When you topped the barge around was there any change in the list or trim of the vessel?

A Well, it was down on the head, and that is all.

Q Down where?

A Down on the head.

Q And the head was now facing downstream instead of upstream, but she was still down by the barge's head?

A Yes, sir.

Q Did you seem to be making any progress against the water with the two pumps?

A No, sir.

Q How do you know that?

A Well, it was running out, and it seemed like it was going down all at the same time.

Q In other words, the two pumps were working, as far as you could see, but she was still going down by the head?

A That is right.

Q And then all of a sudden it became clear to you that the captain was going over there to try to beach you?

A Yes, sir.

Q And the next thing you feared was that she was going to let go, and she did let go?

A That is right.

THE COURT:

That is all I have. Are there any further questions?

MR. KOHLMEYER:

No questions.

THE COURT:

We will recess now until 10:00 o'clock--

MR. KOHLMEYER:

Your Honor, we could get one more short witness now.

THE COURT:

Very well.

R. R. HURLEY: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q State your full name and address, please, Mr. Hurley?

A Reilly R. Hurley, Mount City, Illinois.

Q What position did you hold in December, 1954?

A Chief Engineer.

Q On what?

A On the motor vessel Childress.

Q What sort of license papers do you hold from the Coast Guard?

A I have a 3200 horsepower license.

Q Steam or diesel, or just diesel?

A Diesel. I have steam license all horsepowers, on inland waters.

Q How long have you held your engineering license?

A Steam or diesel?

Q Either one.

A I have had the steam license since 1942.

Q And the diesel?

A Since 1947.

Q Do you recall a voyage of the Childress which started at New Orleans, northbound, on the 10th of December, 1954, when the La Belle was lost?

A Well, I don't exactly recall the voyage. I can recall that about the barge, the voyage that we had the barge. I can recall that.

Q Was there anything unusual about the voyage, so far as your engine room is concerned?

A Not that I can remember.

Q Your engines functioned properly at all times?

A As far as I can remember.

Q How is the Childress controlled?

A The einge?

Q Yes? It is pilothouse controlled?

A The speed of the engine is controlled by the pilothouse. It can be that way, or it can be in the engine room. The engines are started by the engineer on watch and turned over to the pilot for his maneuvering.

Q Were you on your regular watch during the period of December 11th, 1954?

A My regular watch, yes.

Q And nothing untoward happened during that time?

A None that I can remember.

Q Did you feel any jolt as if you were in collision?

A None that I remember.

Q Did your assistant report anything untoward that happened to you or to the vessel while on watch?

A I don't recall any.

MR. KOHLMEYER:

That is all.

CROSS EXAMINATION

BY MR. DUNBAR:

Q You maintain an engine room bell book, or is the vessel pilothouse controlled?

A The vessel is pilothouse controlled.

Q Do you keep any record in the engine room of the change of engine movements as you receive them from the bridge?

A No, sir.

Q You do not?

A No, sir.

Q Not even on a scratch paper?

A No, sir.

Q Is there any sort of recorder in the engine room which shows when the engines are stopped?

A No, sir.

Q So that it is fair to say there is no permanent record on your vessel of when your vessel's engines are stopped or when they are operating?

A There is no record to show when the engines were slowed down. If the engines were completely stopped, which the engineer on watch would have to do, there would be a record.

Q What sort of a record?

A It would be entered on the daily log.

Q Did you keep the daily log for your watch?

A I do.

Q Do you have it here with you?

A No, sir.

MR. KOHLMEYER:

We have it in the Courtroom, if the Court please, and we can show it to Counsel if he wants to see it.

BY MR. DUNBAR:

Q What watch did you stand again, sir?

A I stood from 6:00 A.M. to 12:00 Noon, and 6:00 P.M. to 12:00 Midnight.

Q Where in this log are the entires made when the engine is stopped? (Document to witness.) Is there any entry on this page concerning the stopping of the engine?

A Well, this would be an entry (indicating on document).

Q At what time is that entry made?

A Well, it was while we were at Coyle's landing.

Q That was way back at Coyle's landing?

A Yes, sir.

Q Were the engines stopped in the period immediately preceding the loss of the La Belle?

A Preceding?

Q Yes, before?

A Stopped completely? Not that I remember. I'm sure it wouldn't be--

MR. KOHLMEYER:

The witness might be confused with the word "stopped" as distinguished from--

THE COURT:

You will get the witness back.

MR. DUNBAR:

I have no questions.

REDIRECT EXAMINATION

BY MR. KOHLMEYER:

Q This doesn't purport to be a bell book, does it, Mr. Hurley?

A No, that is just a record of the daily log engine operations.

Q And if you land someplace and the wheel stops turning over, no entry is made in this log, is it?

A Just if the wheel stops?

Q Yes?

A No, sir.

Q In other words, as long as your engine keeps on running, even though the wheel stops, you make no entry here?

A No entry.

MR. KOHLMEYER:

That is all.

BY THE COURT

Q Do you have anything to do with the pumps on the vessel?

A Which pumps?

Q Pumps that may be used to pump out barges that may be making water?

A The only time I would have to do anything with those pumps would be if they weren't operating and they would bring them back to the engine room to work on.

Q Is there any pump for such use which would get its power from the engine?

A The main propulsion engine or from the auxiliary? No, sir. Of course, the electric pump would get power from the generator service.

Q Reference has been made to a four-inch pump. Are you familiar with that one on the vessel?

A Gasoline or--

Q The reference was that it was a four-inch pump.

A Yes, I believe I know which one it is.

Q What kind of pump is that?

A It's a gasoline pump.

Q In other words, it has its own motor power attached to it?

A Yes.

Q And what is the purpose of that pump?

A To be used in pumping barges.

Q That is the purpose of it?

A Yes, sir.

Q How much does that pump weigh?

A I don't know.

Q Is it a pretty heavy pump? How would it be carried from barge to barge and from the tug to the barge?

A Well, that is not in my line of duty, and I--

Q You don't know?

A Well--

Q But the purpose of the pump is to pump out barges?

A As far as I know that is the purpose of it.

THE COURT:

I have no more questions.

MR. DUNBAR:

I have no questions.

MR. KOHLMEYER:

No questions.

THE COURT:

Thank you, sir.

We will recess at this time until 10:00 o'clock tomorrow morning.

(Whereupon, Court recessed until 10:00 o'clock A.M. Tuesday, June 5th, 1956.)

o-o-o

(Tuesday, June 5th, 1956)

THE COURT:

You may proceed.

MR. DUNBAR:

May it please the Court, I have a photostatic copy of a letter which was written from McDonough Marine Service to Mr. J. E. Walters, confirming the agreement between McDonough and Louisiana Bridge Company. Opposing Counsel has agreed to stipulate that the photostatic copy is a true copy of the letter, and that the letter represents the confirmation of the agreement between McDonough and Louisiana Bridge Company.

THE COURT:

Number it and put it in evidence.

MR. DUNBAR:

I offer, introduce, and file in evidence, the letter referred to, and mark it for identification Walters-3.

(Whereupon, the document above referred to, marked Walters-3 for identification, was received in evidence.)

MR. KOHLMEYER:

If the Court please, we have a witness who is an expert who would like to get out on an afternoon plane, so with your Honor's permission, we would like to put him on out of order.

THE COURT:

Very well.

JACK D. WOFFORD: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q Will you state your name?

A Jack D. Wofford.

Q How old are you?

A Forty-two.

Q By whom are you employed?

A American Barge Lines.

Q In what capacity?

A Port Captain.

Q Where?

A Jeffersonville, Indiana.

Q Do you hold any licenses or papers in the Coast Guard as to navigation?

A I hold a master's and first class pilot's license.

Q From where?

A New Orleans to St. Louis and Cincinnati.

Q Have you ever had occasion to work as master or pilot on towboats?

A Yes, for ten years before I came into the office.

Q Have you had occasion to make up tows?

A Yes.

Q For whom? For whom were you working when you did that?

A For the American Barge Line and the Corps of Engineers.

Q What size tows did you have occasion to make up in your experience, Captain?

A They varied, of course, the barge line tows are made up according to the business that they have. It maybe averages twelve or fifteen barges, I would say.

Q What sort of towboats did you run on.

A Steam and diesel.

Q I show you here, Captain, a page which will be identified as Valley-9, from the log of what purports to be the log of the L. Wade Childress for December 11th, 1954, and if the Court please, we would like permission to substitute a photostatic copy for the original when the time comes to offer it, and ask you to look at the sketch of the tow which appears in the margin of the log, and to study that sketch for a moment

to familiarize yourself with it. (Document to witness.)

A All right.

Q All right, Captain, do you know the size of the various barges which appear labeled on that sketch?

A (Viewing document.) I am not positive of the size of all of them, but if Valley barges are like American's, I'm quite certain, by looking at the diagram, I can identify the sizes.

Q Will you state what the sizes are, please?

A The four barges across the face are 26 x 175, and the four in front of that are 26 x 175, and the three barges on the port side of the next string are 35 x 155, and I believe this MV 112 is 35 x 132. The next three out are 35 x 195, and the one barge on the extreme point is 35 x 195, and this CT 308 appears to be a 35 x 132. Now, getting back to the barge behind the La Belle, it is apparently 35 x 132, and the La Belle, I am not positive of the size of it, but I understand that it is an odd size from looking at it in the barge line for you--it is an odd size barge. It is not regular.

Q Will you assume for the purposes of your testimony, please, Captain, that the La Belle is an old river ferry or a steamboat, which is cut down and made into a barge, and measures approximately 145 x 35, by 5½ foot depth. It has a model bow and a rounded or a square stern--I don't know which--with a fantail constructed on each end of the hull. It has a ramp on each end also, Captain, and will you, from looking at this tow state whether or not in your opinion the tow seems to be properly made up for a voyage from New Orleans, northbound, to

some point above Baton Rouge?

A (Viewing document.) It looks well to me. It looks all right.

Q Now, assume, if you will, Captain, that the freeboard on the La Belle is approximately 2½ to 3 feet. Will you state whether or not, in your opinion, the La Belle should have been placed in the position that it appears to be on the sketch?

A It looks all right to me where it is. If it would have run under, or anything like that, it would have done it right away because you get up to your speed within very few minutes, and maintain the same speed. It wouldn't fluctuate much.

Q Will you state whether or not it would be proper making up of a tow, in your opinion, to place the La Belle inside that string of barges, in other words, to bury it?

A I wouldn't do so myself, because the pictures I have seen of the La Belle don't have the fastenings to make a tow up rigid, as it must be. A tow must be rigid, like one piece, or you couldn't possibly handle it with a boat on the after end of it.

Q Captain, those pictures that you referred to, I show you here a group of five pictures marked Grant-3, Grant-4, Grant-7, Grant-9, and Grant-10, and ask you are those the pictures that you just referred to? (Photographs to witness.)

A Yes, these are the pictures I had reference to.

Q Is it good practice to have a tow moving north in Mississippi River that is not rigid, Captain?

A It is practically impossible to handle it.

Q So that the idea of making up a tow is to achieve rigidity between your various barges, is that right?

A It must act as though it were one piece, at least, the backbone of it must.

Q If the barge La Belle were buried in the middle of that tow, what would be the affect of burying it?

A It probably wouldn't fit in there where you could make your tow rigid.

Are you familiar generally with the type barge that is in this tow, other than the La Belle?

A Yes, sir.

Q Are those barges raked at both ends?

A Normally so.

Q Would you say it would be good practice to put a raked barge in front of the La Belle?

A I would say in this case, no, as it has machinery on the barge, and if the barge were to get loose while you were placing it in there, or later, it would probably damage the equipment on the barge.

Q Would you say it would be proper to put the La Belle at the extreme head, as the head barge of this tow?

A I wouldn't want to do that.

Q Why, Captain?

A It would catch the brunt of the force going through the water greater than it would on the side.

Q Which barge catches the most of the brunt in this tow as it is made up?

A The barge in the very head catches most of the water and waves, as the others seem to iron it out as it comes over it.

Q As between MV 602 and CT 308 in this tow, which one took the most force of the water?

A In my opinion 602 does. It is the very spiked barge.

Q Where do you generally place loads and empties when making up a tow of this nature?

A Well, this tow here is a normal made-up tow, I would say. It is as this one there, this is a very good example of a normal tow.

Q Where do you generally place barges in a tow with reference to the draft of the barge?

A In order to get a good steering tow your heavy barges should be back near your boat.

Q In your opinion, would it be good practice to place a loaded deept draft barge in front of the La Belle in this tow?

A No.

Q Why not?

A You couldn't hold the heavy barge in front of the La Belle properly.

MR. KOHLMEYER:

That is all.

Answer this gentlemen's questions, please, Captain Wofford.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Captain, you mentioned you are generally familiar with the dimensions of the Mississippi Valley barges, and do you

know which ones had raised cargo houses, and which ones did not?

A No, I couldn't answer that. We handle Valley barges occasionally, but I'm not that familiar with them.

Q Do you know whether Barge 112 had a raised cargo house or not?

A No, I don't.

Q Assuming that it had a raised cargo house, would you still say it was proper procedure to place the La Belle in front of it?

A That wouldn't bother me about it being there. The house wouldn't have any affect on it.

Q Would you be able to see the deck of the La Belle from the Childress if the 112 had a raised cargo house?

A How is the pilothouse on the Childress? I would have to assume you could, but to say yes or no I would have to look--

Q Well, assuming that you could not see the deck of the La Belle, would you say that it would still be proper to place it where it is in this tow?

A Yes, as you don't have any other place to put it that would suit me as well as this. I would put it there if I were making it up.

Q Do you see where barge CT 504 is placed, the first barge in the port string?

A Yes, sir.

Q Could the La Belle have properly been placed there?

A It could have been, yes.

Q You mentioned, sir, that in your opinion the 602 faces

the greater brunt of the current?

A Right.

Q And you said that you would not have put the La Belle in that position because the La Belle would have had to face into the current?

A Well, that is one of the reasons. Another reason is that if you will notice here, this is an empty here (indicating on chart).

THE COURT:

Give the number.

THE WITNESS:

622, and if I were to put the La Belle where 602 is, it would be putting it in front of an empty, and the La Belle would run up under the rake and probably damage the equipment, and you couldn't make it fast and rigid that way.

BY MR. DUNBAR:

Q Wasn't your testimony that the 602, being the most lead barge, would hit the current with greater force than the other barges?

A I believe it would, and the waves, if you meet a ship, or something like you do regularly.

Q Forgetting the 602, which other barges in that tow would have the most difficulty with the current?

A Any of the barges in the lead or head of any string. After that would be the next.

Q And the La Belle is the lead barge in the starboard string?

A That is right.

Q Isn't it just a question of degree, and isn't it improper to place a laden barge in the lead in any string?

A No. If you had all loads, what would you do?

Q But do you have all loads?

A Very often.

Q In this situation, do you have all loads?

A No, not in this tow.

Q Isn't true that where you have loads and empties, that it is common practice to see that all of the lead barges are empty barges?

A No, is isn't, not with American Barge Lines.

Q Do you know how much cargo was loaded on the La Belle?

A Not positively. I heard of some equipment, but I wouldn't think that it weighed very much.

Q If I told you there was approximately 200 tons of cargo on the barge, would that change your opinion?

A Not if the barge is roughly 35 x 100 and something, I don't know just what it was, 200 tons shouldn't push it down over, I would say, 18 inches, or 2 feet at the most.

Q When you are making up a tow do you consider as a factor the cargo that the barge is carrying?

A Will you state that again, please?

Q Do you consider the type of cargo that the barge is carrying when you are considering where to place that barge in a tow?

A I don't believe I do. I'm not following you on that one, just what you mean.

Q Well, this particular barge, as you know,was loaded with very valuable cargo of sugar or a cargo of contractors' equipment that is merely chocked to the deck of the barge?

A When you say "trouble", dampness wouldn't bother the things on the La Belle, where it would the sugar, if you want to compare it that way. The equipment is out in the open, and it wouldn't bother it if it rained, or if a wave wash would come alongside and slosh up, and it just wouldn't hurt anything that way.

Q Well, do you think that the La Belle was a type of barge that could be safely carried in a river tow of this type?

A I think it could, yes.

Q You mentioned that it would not have been possible to put the La Belle in the center section of the tow because she was not equipped with proper fastenings. Now, assuming that she was equipped with fastenings, would you have put her in the center of the tow?

A That would bring on more thought. You would have to see that it would--the river term is "shake hands", and that means that the square fit the other square part, so as to make it rigid. You would have to take that into consideration too. I don't believe it had tow knees on it, or anything, where it would fit in solid. It must be solid so as to fit in the middle in here (indicating on chart), so as to make up a tow to suit me.

Q If the barge had been in the position that I suggested, where the 504 is, the first barge in the port string, would it have been easier or more difficult to care for the barge?

A Well, you would have it sticking out on the side, and it is 9 feet wider than this barge, so it would be sticking out 9 feet there (indicating on chart). As far as caring for it, the normal procedure is, the matter of taking care of a barge, as far as pumping it, or looking after it, or things like that.

MR. DUNBAR:

I have no further questions.

MR. KOHLMEYER:

No questions.

We would now like to call Captain Powell.

ROBERT E. POWELL: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q Will you state your full name?

A Robert E. Powell.

MR. KOHLMEYER:

If the Court please, before we get out of order, we have here the original freight bill which was sent to T. L. James & Company, Attention of Mr. Walters, by Mississippi Valley, and a total sum of $2,238.71, which is the amount we sued for. It is stipulated that this bill was sent to James, and does represent the amount claimed in our complaint.

We offer the bill marking it Valley-10 in evidence at this time.

MR. DUNBAR:

Very well.

(Whereupon, the document above referred to, marked Valley-10 for identification, was received in evidence.)

BY MR. KOHLMEYER:

Q Will you state your full name, Captain, please?

A Robert E. Powell.

Q Where do you live?

A 1423 Cole Avenue, Poplarville, Missouri.

Q Where are you employed, and how?

A I am employed by the Mississippi Valley Barge Line. I act as master and pilot.

Q What licenses or papers do you hold from the Coast Guard?

A Mate and first class pilot.

Q From where?

A From the U.S. Coast Guard.

Q What area?

A Western rivers, and the pilot's license runs from Cut Off to Cairo on the lower Mississippi River, and all of the Ohio River, and then from Cairo to Wood River, Illinois on the Upper Mississippi River.

Q How long have you been employed in and about boats?

A Since 1948.

Q How long have you held your pilot's license?

A Since 1948.

Q On December 10th, 1954, where were you employed?

A Aborad the L. Wade Childress, Mississippi Valley.

Q In what capacity?

A Acting master.

Q On that day where was the Childress?

A Northbound on the lower Mississippi River.

Q I show you here, Captain, two sheets marked Valley-9 and Valley-9A, and ask you if you can identify these two sheets? (Documents to witness.)

A These are logs that I made up myself, personally.

Q That is the log of the Childress?

A That is correct.

Q And the entries therein are in your own handwriting?

A That is correct. This is my handwriting in the log.

MR. KOHLMEYER:

We offer in evidence the log of the Childress marked Valley-9 and Valley-9A, and ask leave to substitute photostats in lieu of the original.

THE COURT:

Very well.

(Whereupon, the documents above referred to, marked Valley-9 and Valley-9A for identification, were received in evidence.)

BY MR. KOHLMEYER:

Q When did you make the entries in that log, Captain?

A I make the entries on the log as each thing happens.

Q If you would look at 9-A, the log sheet for December 11th, you will see a sketch in the left-hand corner or margin. When did you make that sketch?

A I made this sketch on the day the log was put out. I made out the log.

Q Well, what does that sketch represent?

A A tow formation of the L. Wade Childress, northbound from--.

Q As of what time does it represent?

A This tow formation is after we picked up 9 empties above Walnut Street in New Orleans, the Bisso Landing, I think it is.

Q Did you drop any barges or pick up any barges after Bisso Landing?

A We dropped one empty and picked up one load at Grammercy.

Q And that sketch represents the position of the various barges in the tow following the last drop off at Grammercy?

A That drop off and a pickup, that is right.

Q Does that sketch represent the position of the various barges in the tow at the time that the La Belle got in trouble?

A It does, the position of the barge and the tow formation at the time.

Q What time did the Childress arrive in New Orleans on its southbound trip, Captain?

A It arrive December 10th, at 4:35 P.M. in the afternoon.

Q Where did it go?

A It went in to Coyle's landing at New Orleans, and we dropped our northbound tow.

Q You dropped what, Captain?

A The southbound tow, at Coyle's.

Q And then what did you do?

A We proceeded then to the tow that was laid up in Coyle's landing, to make up up, finish wiring that up, and proceeded on the way.

Q What time was the tow finished, made up?

A We finished--we departed Coyle's at 7:00 P.M. with it, 9 loads.

Q So that means that you were two hours and twenty-five minutes making up the tow at Coyle's, is that right?

A No, that two hours' time, I stated this was the time we came into Coyle's, dropped the southbound tow, and picked up, made up and departed with a northbound tow.

Q What is the duty of a master when the tow is picked up?

A The duty of a master is to look over the tow formation, give his opinion, and then give orders to the mate to go ahead and wire it up as to my orders.

Q Did you give any orders in this case?

A I definitely gave orders in this case to make up the tow as it was laid out.

Q You inspected the tow yourself?

A I inspected the tow formation and looked over the barges, and everything looked to be to my satisfaction, the towing.

Q Did you actually go out on the barges and inspect the barges?

A I did not at that time go out on the tow, but I reflect and make actual inspection of a barge.

Q Do you generally go out on the tow to make an inspection of the barges when the tow is being made up?

A Not generally.

Q Whose duty is that?

A To make an actual inspection of each barge, it isn't a

general practice, that is, to make an inspection at the time it is picked up, but just more or less looking over the barges. We do the inspection of the tow after we actually get under way, you know, checking them over.

Q Who makes up the tow itself, Captain?

A It is made up by the mate and deckhands, under my orders.

Q Which mate made up this tow?

A The mate on watch was the second mate, and he had also doubled over the first mate while making up tows.

Q So you mean that both your first mate and second mates were on this tow?

A That is correct.

Q What time did you get under way from Coyle's?

A At 7:00 P.M.

Q Where did you run to then?

A We went to Walnut Street, the Bisso fleet, where we had the tug set out 9 empties.

Q And then what did you do?

A We proceeded on up northbound, and the mate proceeded, while under way, to make--putting in more wires, and making the tow more sturdy.

Q How did you get the barges into your tow?

A Our tug set the barges out.

Q Which barges were these?

A It was MV 614, MV 618,604, and I think I missed 602, and 724 and 622; and CT 308 and CT 504, and CT 414.

Q So that, Captain, when you left Coyle's fleet you had

what barges? What barges did you have in tow aside from the ones you dropped off at Bisso?

A We picked those up at Bisso's.

Q Aside from those, what ones were at the Coyle fleet?

A At Coyle's fleet we picked up the Barge La Belle, and MV 761, MV 510, and MV 512, and MV 523, and MV 377, MV 362, MV 532, and MV 705.

Q In other words, those were all the loaded barges in the tow, is that right?

A That is correct. They were all loaded barges.

Q Which one did you drop off at Grammercy, and which one did you pick up at Grammercy?

A We delivered MV 614 at Grammercy.

Q Was that an empty or a load?

A That was an empty, and we picked up MV 372, a load, at Grammercy.

Q On what side did the tug at Walnut Street deliver your empty barges?

A On the port side. On our port side.

Q What did the Childress do while the load was being made up at Walnut Street?

A These were empties.

The Childress killed her headway and just held up abreast of the fleet when the tug set them out.

Q Did you moor the Childress or the tow while you were making up the tow?

A I did not moor the Childress at any time while picking up the empties.

Q In other words, you were in the stream at all times?

A I was in the stream at all times.

Q Would you state the size of the Childress, Captain?

A The dimensions on the Childress, she is 176 feet long, 40 feet wide, and 45, I think 45 and 1/6th high, and a draft around 8 foot 2, or around there.

Q What sort of power does she have?

A She is powered by two 16 horsepower General Motor diesels.

Q You say 16?

A Two of them, which produces 3200 horsepower.

Q 1600 you mean for "16"?

A 1600, yes,

Q Will you look at the sketch on the log which you have in your hand, and tell us the sizes of these barges in the tow as it is made up?

A Well, the two lines over, immediately on the face of the boat which is 8 barges, their dimensions are175 feet by 26 feet wide.

Q All 8 of those barges are the same?

A All 8 of those barges are the same.

Q What do you call a jumbo barge?

A A jumbo barge is, on our tow company, 195 feet by 30 foot wide.

Q Did you have any jumbos in this tow?

A That is correct, we had some jumbos in this tow.

Q Which ones were they?

A They were MV 761, MV 604, MV 622, MV 705, MV 602, and

MV 724, and MV 718.

Q Is that 718 or 618?

A That is 618.

Q So you had 7 jumbos in the tow, is that right?

A That is right.

Q What is the CT 308?

A That is what we call a square, 132 x 35 foot dimension.

Q What is the MV 112?

A That is what we call a Valley square,which is the same dimension, 132 x 35.

Q What was the outline of these barges, Captain? Did they all have raked ends?

A On the two squares they both had raked ends.

Q How about the jumbos and ordinary sizes?

A The ordinary barges, they have semi-unit barges, square ended.

Q I didn't hear you?

A On these raked ends of these barges, they are unit--they are semi-unit, square end on one end.

Q On all of the 8?

A On the standard barges, on the face they are all--

Q We are talking about the jumbo barges? The jumbo barges are what?

A The jumbos are 195 x 35.

Q And they have one rake end and one square end, is that correct?

A That is correct.

Q And the other 8 barges, the ones right on the face of the tow boat?

A They all had rake ends.

Q Both ends?

A That is correct.

Q How about MV 112?

A It had raked on both ends.

Q How about 308?

A Raked on both ends.

Q How many of these barges were open hopper barges?

A That I don't know the exact number, just which ones are open hoppers. Some of them units are open hoppers, and the others are covered barges, and I don't know right now which ones were the open hoppers and which ones were covered barges.

Q On the open hopper barge, how high is the coaming over the deck, in round figures, Captain?

A On an open hopper barge, which most are, and if you don't have any cover on you might have a good foot maybe of coaming around it.

Q How high is the house or covering or hatch on your covered barges over the deck?

A They vary. On the Valley squares they run--this is not accurate, but it is around 8 feet, or something like that.

Q 8 feet off the deck?

A That is correct.

Q How deep are those barges?

A The draft of them on the Valley square is around 10 foot hold.

Q Would you know approximately what the draft of these loaded barges was when you left the Coyle fleet, Captain?

A They varied in draft, which was between 7 to 8, and maybe 8½ feet. There would be a variation.

Q What watch did you stand, Captain?

A From 6:00 A.M. in the morning to 12:00 at Noon, and from 6:00 P.M. to 12:00 at Midnight.

Q Did you stand your watch on the 10th of December?

A I did stand a watch.

Q Did you stand your watch on the 11th of December?

A I did stand a watch.

Q When you stand your watch, what is your position on the Childress?

A Standing in the wheelhouse, which we sit forward on the highest point of view on the boat.

Q Approximately how high over the water would the floor of the wheelhouse be?

A It would run around 35 feet, somewhere in that vicinity.

Q What is the nature of the wheelhouse, in so far as your vision is concerned?

A The wheelhouse, you have clear vision out of the wheelhouse on the Childress in all directions.

Q And in your position at the wheel of the Childress, could you see the La Belle?

A I could see the equipment on the La Belle, and the inside forward corner of the La Belle.

Q Why could you not see the whole of the barge?

A Well, it was made up ahead of an MV 112, and the house on the MV 112 knocked the stern view of the La Belle out, and the equipment on the barge La Belle knocked a clear view of the outside of the Barge La Belle from me.

Q But you could see the inside forward corner of the La Belle?

A I could see the inside forward corner.

Q At any time during your voyage did the La Belle duck under the water?

A It did not duck under at any time on my watch.

Q What speed were you running upstream, Captain?

A Upstream in that stage of the river I was making between 5 and 6 miles an hour. It is not accurate, but I was averaging between 5 and 6 miles an hour.

Q Is that normal northbound speed?

A Above New Orleans to above Baton Rouge it is, at that stage.

Q Was this tow properly made up, in your opinion, Captain?

A In my opinion the tow was made up properly.

Q Was the La Belle placed in a proper position in the tow, in your opinion?

A To our opinion it was, and considering all the barges, it was placed in the proper position.

Q Why did you not put a barge in front of the La Belle?

A The La Belle, having not the proper fastenings on it, and at the time picked up it seemed to me that it had enough clearance that it would shove okeh on the head of the tow.

Q How much freeboard did it have, approximately, Captain?

A Approximately maybe 3 feet. It could vary one way or the other.

Q Do you often take barges out with freeboard of 3 feet?

A It is very normal to do that.

Q Is 3 foot freeboard on a barge considered abnormal?

A No, it is considered very good freeboard on a barge.

Q Is it dangerous to tow a barge with a 3 foot freeboard?

A No, it is not.

Q Look at the sketch, please, Captain, and particularly at Barge CT 504 which is the barge on the head of the Childress, on the port side, do you see it?

A Yes, I see the CT 504. (Viewing document.)

Q Could the La Belle have been placed in that position in the tow?

A Well, according to our tow formation for making the tows up, and the size of the barge, and the La Belle being a light draft barge, we make the tow formation up for all the barges or rakes together, to have a better shoving tow.

Q How wide is the 504?

A It is 26 feet wide.

Q How wide is the 414?

A It is 26 feet wide.

Q How wide is the La Belle?

A Approximately around 35 feet, and it could vary one way or the other.

Q If you put the La Belle into the position 504 is in in this tow, what would have been the effect of your placing it

in there?

A The effect of placing it there, it would not headlog on CT 414, and you could not make a coupling, and you could not make your tow up into a safe position to steer with.

Q Captain, during your voyage upstream from New Orleans to the time that the La Belle got in trouble, did you strike any submerged objects or come into collision with anything, to your knowledge?

A I struck no objects of any kind, to my knowledge, at any time while I was on watch.

Q And you stood your regular watches?

A I stood my regular watches.

Q Did you have any collision of any kind?

A I had no collision of any kind.

Q In what part of the river did you run when you were going north with your tow?

A I stayed in the good water at all times, so as to for the best safety of the boat and tow.

Q Captain, at or about 11:35 or 11:45 on the 11th, did anything unusual occur on your trip?

A Nothing occurred until I noticed the head of the Barge La Belle looking like it was down on the head.

Q. At what time did you notice that?

A Somewhere around 11:45. It could vary one way or the other. It was right at watch changing time.

Q In your position in the wheelhouse you could see, I think you said, that you could see the bow of the La Belle, is that right?

A The inside portion of the bow.

Q Had you noticed that it had been going down by the head prior to that time?

A I had not noticed it had been going down prior to this time, no.

Q Had you looked at it from time to time?

A Well, you are looking at it about all times in your vision out over the tow. You see the tow all the time while steering.

Q What did you do when you saw her down by the head?

A Killed headway out of the Childress and her tow, and I blew for my mate on watch. I blew for him to come to the wheelhouse, and being at watch changing time he met the first mate and they exchanged watches, and the first mate immediately went out on the head of the tow and made a check on the Barge La Belle.

Q Where were you in the river at that time?

A About abreast of Plaquemine.

Q In what part of the river?

A At the time I noticed I was near the center of the river, at the time I noticed it.

Q Now, did you follow the sail line suggested by the engineers when you come up stream?

A I don't follow no sail lines which is put out for ships. River boats do not following their sailing lines.

Q I think you said that you blew for the mate, and on the change of watch the first mate came up and went out on the head of the tow?

A The secon mate, he come to the wheelhouse and went out, and as he went downstairs he met the first mate and they exchanged watches, which the first mate immediately went out on the tow.

Q And then what happened.

Well, the first mate went out on the tow, and he let me know that the barge had water in it, and he proceeded to get a pump in it, which we had already had a pump in the barge, from my understanding, and they put another pump, which was two pumps, and they come back and got a gas pump and put it in the barge.

Q How big is the gas pump?

A I think the one they put in was about a 3 inch pump.

Q What other pump did you refer to that they had in the barge?

A An electric 3 inch pump.

Q How is that rigged?

A It was rigged on stock, and you have an electric motor set on top, which we use power from the boat. We have an electric cord leading out on the--

Q What other pump did you have on the Childress?

A You generally have another electric pump, and then we have a 4 inch, a big 4 inch gas pump, that we keep on the stern of the boat at all times.

Q You say you generally have that?

A We always have that.

Q Did you have it on that day?

A We had it on that day.

Q Were they in good working order, to the best of your knowledge?

A They were.

Q Did you personally go out on the head of the tow to see the La Belle?

A I personally went out. Possibly he came up to the wheelhouse and he took over for a short while, while I went out and made a check on the barges myself, and on making a check I advised the mate to top the barge around, and I proceeded back to the wheelhouse immediately, and took charge of the boat.

Q When you saw the La Belle at that time, did you actually go on board the La Belle?

A I think I stepped on the deck of the La Belle to check to see what was the matter, when I seen the condition of the barge, and that is when I advised the mate that we were to top the barge around.

Q Did you get your feet wet?

A I did not get my feet wet.

Q Was there any water on the deck of the La Belle?

A On the immediate deck no.

Q You mean--

A On the deck, no.

Q Were the pumps operating when you were there?

A The pumps were operating.

Q Had you had any reports of anything wrong with the La Belle prior to the time that you referred to, around 11:45?

A I had no prior information before I vame on watch.

Q Does it happen very often during towing that you have water in a barge which will require pumping?

A It isn't unusual to have a barge leak, or pumps running out on the tow at any time.

Q If a barge is being pumped, do your mates advise you of that fact?

A Well, if it is at nighttime and I am off watch, no, they wait until I come on watch, and if it is not dangerous, or if the pumps are gaining on the barge, or anything like that, and they are pumping, which is ordinary for them to do, it is their duty to pump the barges out whenever necessary, and I don't necessarily have to know when there is some water in the barge.

Q What do you mean by topping a barge around?

A That is to top, to change ends with the barge in tow.

Q How do you accomplish that?

A There is different ways. In this case we had the headway killed out of the tow, and proceeded to knock the wires off and catch a line on the outside lower end of the barge from the headlog of the outside barge behind it, and to start the barge topping you back up so as to give it a flip out, and proceed, which is proceeded in after it gets a certain angle out, and then you proceed with some headway so as to let her turn on around.

Q So that the object of that is to shift the barge around in position so that what had been her head becomes her stern, and what had been her stern becomes her head?

A That is correct.

Q Why did you do that?

A To get the lower end aft so as to try to get it up on foot of a bar.

Q Was there a bar in the vicinity of where you were?

A There was a bar, a middle bar, just above Melodian Point, which I was proceeding to at the time the barge went down.

Q Was there any closer bar or closer place that you could proceed to beach the barge?

A To beach the barge, I don't think there was any closer that I could have gotten it to any safer.

Q When you beach a barge, how do you do it?

A I don't think there is any set way to beach a barge, but the main object is to try to get it in the shallow water, on a sand bar, if possible.

Q Can you push it with the heavy end forward, or do you push it with the heavy end aft?

A It depends on whether you can shove the heavy end forward; if you think it is dangerous to shove that end, you proceed to top it, which in this case I assumed it was too low to try to get headway, and it was dangerous to dive under.

Q Captain, after you had given orders to top the barge around, what did you do?

A We proceeded.

Q Where did you go? What did you do?

A I went back to the wheelhouse and took command of the vessel.

Q What orders did you give?

A The order that I gave was to top the barge around and keep the pumps going. That was mainly my main object then, on that stage of the barge, and that was to try to get it beached, if possible.

Q And what did the Childress do at that time?

A I don't quite follow you on that.

Q Did she come ahead or go astern? Was there any change in the wheel or course?

A After topping the barge around, I proceeded to favor the point, to get on the inside of the bar, which is the normal part for the lower end of a sand bar to flatten out, which is the normal thing for a barge to do.

Q How was the La Belle secured to the tow at this time?

A With Manila lines

Q In what position was she in the tow?

A She was alongside the MV 112.

Q And that was the barge that was immediately behind her before that?

A That is correct.

Q How long would you estimate it took to top the barge around and make her fast in her new position?

A That is hard to say. I would say about 3 or 4 minutes to top that barge around.

Q Was the electric pump running during that period?

A While they were knocking the wires off, yes, but they broke the electric pump cord for a short while while topping the barge around, and then they re-plugged the pump in.

Q What happened to the barge after she was topped around?

A From my vision in the wheelhouse, after topping the barge around I proceeded to work the Childress up to the foot of the bar, as far as I deemed, which I reduced the speed, so as to beach her, and while proceeding to the bar the La Belle's stern kept getting lower, and the equipment, after it got to a certain--well, down so low, this equipment started shifting aft, which was throwing all the weight on the stern end of the barge, and it immediately sunk and went under, that is, the lower end of the barge, and dumping all of the equipment, and the Barge La Belle, when she went under the equipment shifted aft and she broke the stern line, and the tow line, and when she went under, the stern part of the barge, which the whole barge never completely went under, she come up and went out away from the tow, where she settled, that is, where she sunk away from the tow.

Q When you lost the equipment off of the La Belle, did the barge tip from side to side or from forward to aft, or how?

A She, more or less, tipped fore and aft until the equipment got on the stern end there, and at the last moment she seemed to cock over to the inside lower corner that was next to the tow at the time.

Q What is that 4 inch pump which you refer to, Captain?

A It is a large pump which we have occasion to use it when a barge gets in danger, if you have time to get it out, but that pump is too heavy for four men to pick up. It is a large pump, and it is very heavy and four men can't pick it up, it is that heavy. That is heavy enough that they can't pick it up, and

you cannot run it along the gunnels of the barge, and you generally have to have a boat up alongside of the barge so as to set it out on the tow.

Q When you left New Orleans, was there anything that you know of that was wrong with the Childress?

A To my knowledge there was nothing wrong with the Childress.

Q All of your equipment was properly working?

A All the equipment, to my knowledge, was properly working.

Q Did you have a full complement of men aboard?

A I did.

Q Was it your usual crew?

A It was my regular crew at the time.

Q Did the same crew stay on board the whole time, from the moment you left New Orleans to the time that you got to--I'll put it this way: Did you have a full crew aboard at the time that the La Belle sunk?

A That is true.

Q And had anything happened on the voyage which would have affected the Childress in any way?

A No.

Q Did you feel any shock or collision or stranding immediately before you noticed the La Belle in trouble?

A No, I did not.

Q Do you know of any obstruction in the river in that area?

A I know of no obstruction in that area of the river.

Q How much water do you think there is in the river where you were sailing at that time?

A Well, my fathom meter, at the time I checked the barge, sunk, but in locating it it was somewhere around 50 feet of water. It could be slightly more. There is a set ships' channel, which I think is around 35 foot, from New Orleans to Baton Rouge.

MR. KOHLMEYER:

That is all for right now.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Do you have a master's license?

A I do not.

Q You do not?

A No, sir.

Q Is it required that a person have a master's license to navigate a tow brought from New Orleans up the river?

A On diesel boat, no.

Q What time, about, did the Childress get to New Orleans?

A The Childress arrived in New Orleans on December 10th, 1954, at 4:35 P.M.

Q What was the first time you saw the Barge La Belle?

A It was between 4:30 and 5:00 P.M. It was after 4:35 P.M. which I proceeded to drop my southbound tow, and on arriving at New Orleans you don't know which barges tc pick up, and we have to land the tow before we get our orders which barges to pick up, so it was after 4:35 P.M. on December 10th.

Q Who instructed you to pick up the La Belle?

A Our agent in New Orleans.

Q Where in the Coyle fleet was the La Belle?

A They make up the tow somewhere--well, mostly on the upper end of the fleet.

Q Was the La Belle moored to the bank, or alongside other barges? What was its position in the Coyle fleet?

A In the tow formation, they had the Barge La Belle, and she was on the outside of that Coyle fleet, on the head end.

Q Had they already made up the tow for you?

A They had the tow in formation, but as far as wiring the tow up they had not wired it up. We had the rigging aboard the boat to do the wiring of the tow.

Q But they had already determined where to put the La Belle in the tow before you arrived?

A They determine that, and then they check this formation with me, to see if it is to my satisfaction.

Q Who, with the Mississippi Valley organization, made that plan or formed that tow for you?

A It was generally the officials of the Mississippi Valley Barge Line.

Q Who was it in this particular case?

A Well, Mr. Boyd was the agent in New Orleans who presented me with the tow diagram.

Q He actually presented you with a tow diagram?

A With a tow orders.

Q What is the nature of that diagram?

A Well, they present the barges written out and their destination to us.

Q But does that diagram show you where in the tow each barge is to be placed?

A Not necessarily unless it fits my--I always have the right to change it to any tow formation to my satisfaction.

Q But you are given a tentative diagram or tow makeup, is that correct?

A On most you make up the tows in tow formation. It is not set--we, more or less, have a set thing to put our heavy draft barges nearest the boat in line for the best shoving, and wiring the tows to make them stout enough so that we can steer.

Q I understand that, Captain, but I understood you to say that the La Belle was already in formation when you fist saw it, is that correct?

A She was laid in, more or less, in a formation in the tow as I took it out.

Q Did Captain Boyd or anybody else present you with a diagram showing the position of the La Belle in that tow?

A They presented me with numbers of the barges and positions.

Q What happened to that slip of paper or diagram? Do you have it with you?

A No, I don't.

Q What is generally done with it?

A It is just, more or less taken aboard, and that is just orders, and after so long they are discarded.

Q Has that particular diagram been discarded?

A It has. The diagram is what we have on board here.

Q Do you know whether Captain Boyd, or anybody else with the Valley organization, kept a copy of that diagram?

A I have no knowledge as to that.

MR. DUNBAR:

I call for the production of the diagram.

MR. LEMLE:

We don't have it.

THE COURT:

You say you don't have it?

MR. LEMLE:

No, sir; they are all destroyed.

MR. DUNBAR:

I would like to call for the production of any records that the company might have which would show the orders of any diagram showing the position of the barges in that tow.

THE COURT:

Does Mississippi Valley have any orders, or copies of any orders, given this tow boat once she left New Orleans?

MR. KOHLMEYER:

I don't know.

THE COURT:

Suppose you try to find out, and make a report on it when we reconvene after lunch.

MR. LEMLE:

Mr. Boyd was in the Courtroom, and he is going to look and see if he has. He says he doesn't know whether he has them or not, but he is going to see.

BY MR. DUNBAR:

Q Captain, on this particular occasion did you pick up the tow exactly as it had been planned by the officers, or did you

make any changes?

A I made no changes. The tow looked to me to be in a proper formation, so I proceeded to wire it up.

Q But the tow that you left Coyle's with was exactly as it had been planned by the Valley's office?

A That is true.

Q Did you say who in the Valley organization had made that diagram?

A I did not say who made it.

Q Do you know who made it?

A I don't know.

Q Captain, did you study the diagram that was submitted to you?

A I did. I always study all tow formations, and it is under my orders at all times, as to any position in the tow that I think the barge, to put it there, that is under my orders that I am responsible for to put the barge on that particular position.

Q What was the position of the La Belle in your tow as it originally was made up at the Coyle landing?

A The original position was on the starboard side, on the head starboard string, the head of the starboard string of barges.

Q Were there any barges ahead of it?

A No.

Q Were there any barges in any other of the strings ahead of the La Belle?

A No.

Q In other words, the La Belle was the head barge in the entire tow?

A No, it was not the lead barge in the entire tow.

Q Well, what was the lead barge?

A The lead barge was in the center string. You don't put off one--I mean you don't put the outside string, make them the longest length.

Q What inspection did you or your officers make of the La Belle at the time you incorporated it in the tow?

A The inspection we made of it is, which is normal, is to wire it up, and if it looks satisfactory, and everything, they go ahead and wire it up, and they proceeded under way before they sound any barges.

Q Who made that inspection?

A The mate.

Q Did you leave the pilothouse at anytime while the tow was being made up?

A That I don't recall ever doing.

Q You don't recall whether you left or--

A That is not my job, to leave the wheelhouse to wire a tow up.

Q Did you on this occasion leave the wheelhouse?

A On this occasion I don't recall ever leaving the wheelhouse.

Q Could you see the La Belle from the wheelhouse?

A At the time, making the tow up, we are generally always alongside putting the rigging over, and I did see the Barge

La Belle.

Q Was the barge on an even trim?

A To be exactly, whether she was on an even trim--she looked to be on fairly level trim, but whether she was listing a little one way or another, I couldn't determine that.

Q Did you actually look to see?

A I always looked at any barge I picked up to see if she is setting right.

Q Did you notice how much freeboard she had?

A She looked, seemed to have a good freeboard at the time we picked her up.

Q But is it correct to say that neither you or any member of your crew actually made a detailed inspection of the barge?

A As far as detail, any particular barge, making a detailed inspection, we handle so many barges that it is not customary for any mate on any towboat to make a detailed inspection while making up a tow. They have a lot of work to do, and to make a specific, detailed inspection of the barge, it isn't actually customary on a towboat.

Q Does anybody else with Valley's organization inspect the barges, or the barge, before it is turned over to you?

A That, I don't know that, and I have no authority or any knowledge of what the other people do outside of the boat crews.

Q So your answer is that you don't know?

A I don't know.

Q Did you discuss the proposed position of the La Belle in that tow with Captain Boyd or with the mate?

A I always discuss the tow with the mates.

Q Was anything said with specific relation to the La Belle?

A Out of the ordinary, no.

Q Out of the ordinary, no, you say?

A That is right.

Q At the time you left Coyle's, was Valley Barge 112 immediately behind the La Belle?

A That is correct, it was.

Q How did you describe that barge, was it a Valley square barge?

A We have a set term on the size of the Valley barges, which are jumbos, standard, or square, which your sizes of the standard barges are 132 x 35 foot barges, and that is just a matter of figures.

Q Well, was that barge loaded or light?

A It was a loaded barge.

Q What was it loaded with?

A Cargo, but I don't know exactly what it was loaded with.

Q Is it not a fact that that barge had a house on it?

A That barge did have a house on it.

Q It did?

A Yes, sir.

Q What is the height of that house?

A The exact height of the house, that I don't know. It is somewhere around 7 or 8 feet in height.

Q What part of the barge does that house cover?

A The majority of the deck of the barge.

Q And it was because that barge had a house that you were unable to see the deck of the La Belle?

A The stern portion of the La Belle I could not see.

Q Will you state what part of the La Belle you could see?

A The inside and forward inside portion of the bow, the lead end.

Q What part of the total area of the deck of the barge could you see?

A Well, I would say approximately maybe half of the deck area of the La Belle, and maybe not that much, but just approximately.

Q And you didn't consider that significant, the fact that you could not see the rest of the deck of the barge?

A That isn't out of the ordinary on big tows.

Q Could you see the forward starboard corner of the barge?

A On the forward stasrboard outside of the barge I could not clearly see that for the obstruction of the equipment of the La Belle that was loaded on deck.

Q And you couldn't see any of the stern section of the barge, is that correct?

A Immediately on the stern, no.

Q When you changed the position, or when you changed the tow at Bisso's landing,was the position of the La Belle in the tow changed?

A The position of the La Belle was not changed at any time.

Q Was it changed at Grammercy?

A It was not changed.

Q Captain, you testified that you noticed the La Belle was down by the head at 11:45 A.M., is that correct?

A Around 11:45 A.M., yes.

Q Did you know that there had been a pump on that barge as early as 2:00 A.M.?

A I did know they had been pumping the barge.

Q You say you did know?

A As far as knowing they were pumping the barge, I knew that she had a pump out on the tow.

Q How do you know that they had a pump out on the tow?

A Generally always, the first mate tells the second mate, and the pilot had seen the mate carry a pump out.

Q When did he see the mate carry a pump out?

A At nighttime, when he throwed the light out over the tow a lot of times--

Q Well, what time was it?

A I don't know what time it was.

Q You were not on watch at that time, were you?

A No.

Q When did you first find out that a pump had been put on the barge?

A It was after 6:00 o'clock in the morning.

Q Under what circumstances did you find out about it?

A Well, the mate, the second mate, he goes out on the tow, and this particular morning he went out on the tow, and when he come back, that is when I was notified there was a pump out there.

Q And when was that?

A That was after 6:00 o'clock in the morning.

Q Isn't it true that the second mate goes off watch at 6:00 A.M. in the morning?

A No, the first mate.

Q After you learned that the pump was out on the barge did you do anything?

A There isn't anything to be alarmed about a pump being out on the tow, because on this particular case, one pump, I was not necessarily alarmed about it being out there.

Q You were not alarmed although you could not see the greater part of the deck area of the barge?

A That is correct. The portion I could see of the barge, the barge seemed to be riding okeh.

Q Did it occur to you to send any deckhand out to stand by the pump?

A Not necessarily--on an electric pump, no.

Q Do you know whether as a matter of fact anybody did stand by the pump?

A As far as the boys standing by the pump while it was pumping, I don't think there was anybody actually stood by the pump.

Q Do you know whether the pump was pumping or not?

A That I don't know.

Q You don't know?

A No.

Q How many men are on each watch on your vessel?

A There is three deckhands and a mate on deck watch.

Q Who was standing the 6:00 A.M. to Noon watch?

A The 6:00 A.M., the second mate, Arthur Turner, that was 6:00 A.M. to Noon, and his three deckhands.

Q What were the names of his three deckhands?

A The three deckhands, I don't recall at the time.

Q Are they here in Court?

A I think one of them is.

Q You think one of them is?

A Yes, that is right.

Q Would your log reflect who the other two were?

A You could get the payroll--in my ordinary log it does not state the crew on watch. It is not customary to put--to log every name on watch, that is, everyday.

Q The company payroll would show who was aboard the vessel, but would it show who was on watch?

A Our present payroll, no.

Q What records are kept of who stands what watch?

A There is no exact record of what watch, or employment records when they are employed that shows what watch they are to stand. The employment records do not show that.

Q And you don't know the names of the three deckhands who were standing watch?

A No. The fact of the business is I don't recall all of the names of the crew that were aboard at the time.

Q And you kept no record at all?

A Except the company record which the company has.

MR. DUNBAR:

I call for the production of any records that Counsel

might have which would indicate who these three men were.

THE COURT:

I think it is a little late in the day to call for that. If you had wanted it, you could have called for that by proper discovery.

BY MR. DUNBAR:

Q. Who, in addition to Mr. Turner and the three deckhands, and yourself, was on watch?

A The engineer, and he is employed in the engine room, and in the daytime you had on watch--you have the galley crews, which are the cook and the waiter, and which they work back in the galley, and we do have on the Childress, there is a daylight man who works back on the boat completely, taking care of the upper deck and the wheelhouse, just utility man.

Q At anytime from the time you found out that there was a pump on the La Belle, sometime after 6:00 .M., until 11:45, when you sent somebody out to check the barge, did you have anybody checking the condition of the barge?

A The mate on watch and his crew were working on the tow, and the exact time they were out and did different things, I didn't keep a record of it, which it isn't customary to, upon leaving New Orleans, for maybe a couple of days, that it takes to tighten the tow up, putting on a wire here, and just finding out where we needed another wire to make the tow stiffer and stouter.

Q I want to know what efforts you personally made to find out how the pumping of that barge was coming along?

A Necessarily, personally, no effort is made as long as there is one pump that was running, and I didn't deem it was out of the ordinary, or anything to be alarmed about at all.

Q At no time during that period did you make an inquiry?

A Not necessarily, no.

Q Were you maintaining a lookout at the head of your tow?

A No, I don't maintain a lookout at the head of the tow in clear weather on a towboat.

Q In fact, the fact that the barge was taking on water doesn't change your routine in that respect?

A No. If I deemed that it is not taking anything on to be alarmed about, I don't deem it necessary to keep a lookout on a heavy tow.

Q Is it common practice to keep a man standing by the pump when a barge is taking on water?

A No, it is not common practice.

Q Do you know whether anybody actually went down into the holds of the La Belle at anytime?

A That I don't know whether they did or not.

Q Did you instruct anybody to go into the holds and make an inspection?

A I did not give any instructions for anybody to go into the holds.

Q So as far as you know, no effort was made to determine why the barge was taking on water?

A Ordinarily, when they start pumping the barge, when they first find it, they don't deem it is--it is not necessarily a leaking barge, and it could have been rainwater, or anything like

that.

Q You had a pump running from 2:00 A.M. until the next morning, and don't you think that it would have been good practice to have somebody go down in that barge and check to see what was happening?

A It could be, but on most of the occasions they do do it.

Q Did you make any inquiries to learn what pumps were being used?

A Well, we don't have but two types of pumps on board, and that would be that electric pump and the gas pump, so I didn't have to know what pumps were being used.

Q Captain, based upon what you now know, wouldn't you have sent somebody down in there to inspect the holds?

A Well, at the time, 6:00 A.M. in the morning, apparently when the pump had pumped out, that barge was not dangerous from the viewpoint of the mate, and I generally have always been able to rely on my mates and their word.

Q What routine inspections are made of your two when you are under way?

A Routine inspections after we get under way, the mate, if we have just come out of New Orleans at nighttime, he will check the tow most of the time for water, which on this occasion he did find water, apparently. Then, if any water, if it is not deemed dangerous, or anything like that, or if some barge got a little water, he will put a pump in it, but leaving New Orleans to Baton Rouge, we generally do mostly wiring up and tow making, that is.

Q At what time intervals do you make a check of your tow?

A A deckhand, they check the running lights and show them to the pilot on watch at least twice a watch.

Q And if you have a barge that is taking on water, and/or that you are pumping out, you make more regular inspections?

A The mate generally makes those kind of inspections.

Q Did you inquire to find out what inspection he was making on this occasion?

A Well, to inquire what kind of inspection, no. Apparently he had made inspections, and he was out pumping the barge, so apparently he had made inspections of the tow.

Q Do you know whether or not the pump that was in the hold of the La Belle was operating when the mate got to the bow at 11:45?

A That I actually don't know.

Q Where was the L. Wade Childress in relation to the banks of the river when you first noticed that the La Belle was down by the head, just before noon?

A At the time she was near the center of the river, headed upstream. As far as actually the course or anything like that, she was headed upstream near the center of the river at the time I noticed the barge.

Q Was she below, or opposite Melodian Point?

A She was around a little bit below Melodian Point.

Q What speed were you proceeding at?

A At normal speed.

Q What is normal speed?

A Full ahead on both engines.

Q What speed through the water does that give?

A That through speed of the water, we have no speedometer to tell that.

Q Were you the first person to notice that the barge was down by the head?

A I was.

Q How deep is the water off Melodian Point in the area just below the point?

A There, just below the point, I would like for you to clarify that statement- -

Q Well, in the area just below Melodian Point is the water deep or shallow off the bank?

A How far below Melodian Point?

Q At the place where you were when you noticed that the La Belle was down by the head?

A At the place I was in at the time, I was in deep water.

Q Could you have beached the barge alongside of the bank off the starboard at that time, if you had tried to?

A I could have backed downstream. As far as knowing the shape of the bar, and everything, I would have to back downstream and then look,with no current in the river at this particular place underneath the point of the bar, that it was to my knowledge and everything was just as safe to proceed on the under part of the bar, above the point, as it was to back down the bar below the point, which is a small bar that you are talking about.

Q When did you first actually realize that the barge was in danger of being lost?

A About 11:45.

Q When you saw it down by the head?

A Yes.

Q At any time did you call any of the other members of the crew who were not on watch to participate in the effort to save the barge?

A At this time?

Q At any time?

A I did not necessarily call them out because I proceeded out, and the thing was happening so fast that we didn't--we didn't have a chance to call them out.

Q How much time elapsed from the time you saw the barge down by the head and when it was lost?

A At the time I noticed it, and after I went to the head of the tow myself and come back, it was the actual time--I just don't know--but it wasn't too many minutes running.

Q If I told you that the second mate had testified that approximately 30 to 45 minutes elapsed, what would you say?

A The second mate hasn't been on the stand yet.

Q Excuse me. The mate?

A That would be somewhere around from the first time I noticed the barge to the time the barge actually went down. That would be about right.

Q And at no time did you call out anybody else other than the men who were on watch to participate in the efforts to save the barge?

A At this particular time, no.

Q Do you have any emergency system, or any other way of summoning the entire crew?

A You have a general alarm.

Q Why didn't you try to call out some of the other men to help?

A At this time, in this particular case, it is normal to call out other men, but there were two men out, sir, at the time and they was working on the barge, and at the time I went out and ordered the mate to top it around, and the time the mate topped it around, there wasn't nothing the other men could do about it.

Q But if you had called the other men at the time you noticed the barge down by the head, wouldn't they have had time to get the other two pumps that had not been used?

A At the time? The other two pumps you say? Which other two pumps are you referring to?

Q How many pumps did you have on the Childress?

A You had approximately four pumps.

Q Was it approximately four, or four?

A The large four inch pump, a personal crew can't take it across the tow without a lot of time to do it with, and sometimes it is impossible to do it, which in this case, along the base barges it would have been next to impossible to get the large pump out to the Barge La Belle.

Q Is that pump on wheels?

A It is on wheels, true enough.

Q How many men does it take to push it?

A One man on a flat deck can push it, but that would be on a flat deck.

Q Was there any reason why it could not have been pushed out to the La Belle?

A We certainly couldn't. It would have been impossible to push it out to the Barge La Belle across timbers, timber-heads rigging, and barges, being as the draft of them, and everything, being different. They would have to pick the pump up--they would have to pick the barge up or pick the pump up, and they could not pick the barge up, or pick the pump up.

Q If the La Belle had been in the position in the tow that the CT 308 is, adjacent to the Childress, the first barge in the port string, could the pump have been used?

A No.

Q Why not?

A There is no difference in the length of the--the only thing is you would have to take it another length to get it other than the position it is in.

Q I don't think you understood my question. I'm talking about the barge that is right alongside of the Childress.

A Which barge alongside of the Childress?

Q Well, this (indicating on chart)--

A You've got your tow turned around.

Q I'm sorry, but I was talking about the CT 504?

A The CT 504, in that position in the tow you have an empty ahead, which is a raked barge, and as a master of a boat, in towing barges upstream, you've got to have barges to headlog back on

the face, so as to wire your tow, to get them up directly.

Q Could you have gotten the pump onto that barge?

A Yes, from that position I would back alongside of the Childress, on the face, it could have been gotten on board.

Q How long would it have taken to get it on board of the barge?

A From the stern of the boat it would have took at least ten minutes.

Q And you used an electric pump and a gasoline pump, and could you describe those two pumps?

A I think I described them once.

Q Would you please describe them again?

A The electric pump is on a stand with a motor, which extends down into the barge, and the electric pump motor sets up on top of the stock.

Q What is the capacity of that pump? How much water can it pump out?

A The actual capacity I don't know, but it is just a three inch pump, as far as I know.

Q Do you know the capacity of the gas pump?

A The actual capacity, no.

Q What type of pump is the fourth pump that we have not discussed?

A It is another electric pump which you have to run it off of a cord too.

Q Is it an identical pump to the one that was used?

A That is correct.

Q Do you know why it was not used?

A To proceed with the gas pump, and at the time they got the gas pump out, sir, I understood from my check, and I got out, sir, that I was trying to beach the barge, that they were topping the barge around, and they did not have time to get no third pump and wire up and run a wire.

Q Captain, wasn't it just a case of three men trying to do too much?

A No, it was not that case.

Q It never occurred to you to call out any other members of the crew to put this other pump in use?

A At the time I got back to the wheelhouse and topped the barge around, after they topped the barge around and proceeded, there was just a short interval there that the stuff began to slide.

Q Captain, did you talk to a Lieutenant Rayacich about this casualty?

A There was a Coast Guard man that come aboard.

Q Do you remember telling Lieutenant Rayacich that you had been suspicious about this Barge La Belle from the very beginning?

A I don't recall making any such statement.

Q You are certain about that?

A Suspicious of the barge? Lieutenant Rayacich come aboard the boat and he made and wrote out a report himself.

Q You don't remember telling him that you were suspicious about the condition of the barge?

A From the time I picked it up, no.

MR. KOHLMEYER:

I should like to ask Counsel to show me such a statement, if he has one.

MR. DUNBAR:

I have not stated that such statement exists.

MR. KOHLMEYER:

You certainly indicated it.

THE COURT:

Let me say this; do you intend to produce Lieutenant Rayacich to impeach this witness on this particular point?

MR. DUNBAR:

We would like to reserve the right to call him.

THE COURT:

The point is, unless you have some reason to believe that the witness told Lieutenant Rayacich that, I think the question is improper. In other words, unless Lieutenant Rayacich told you that, or you have a statement to the effect signed by the witness, you just can't get anything out of the air.

MR. DUNBAR:

Of course, your Honor, I have reason to believe that statement was made, or I wouldn't have asked the question, but I have not made a definite decision on whether to recall Lieutenant Rayacich back.

THE COURT:

Let's proceed.

MR. LEMLE:

The witness is entitled to be told whether he intends to

impeach him or not. He can't make a statement that he will make up his mind later. He has asked the witness, and the witness said no, so the witness is entitled to be told whether or not he is going to impeach him.

THE COURT:

The proper time to make that objection is when the impeachment is about to take place.

MR. DUNBAR:

Your Honor, Lieutenant Rayacich did tell me that the witness--

MR. LEMLE:

I object to Counsel stating what the witness told him.

THE COURT:

Mr. Dunbar, you will have to lay a foundation if you intend to impeach the witness. You've got to lay a foundation by giving him the time, place, and persons involved.

Let's proceed.

MR. DUNBAR:

Your Honor, I am going to proceed to something else.

BY MR. DUNBAR:

Q How far were you from this sand bar upstream that you indended to beach the La Belle on?

A How far? It was the actual distance from the bar, and I figured maybe that would be a tow length at the time she went down, or it might be more, but the actual time, the time that elapsed since that time, that I don't recall just exactly how far it was from it.

MR. DUNBAR:

I have no further questions.

REDIRECT EXAMINATION

BY MR. KOHLMEYER:

Q Captain, how much does your four inch pump weigh, would you guess?

A It weighs enough that four good men, if they were in the right position on that deck, it would be hard for four men to pick up if this was out on a flat deck. As far as any--I think it would weigh 500 pounds, maybe that much.

Q How is the bow of the Childress shaped at deck level?

A It is a flat deck, and different height barges, and it may be that the barge, the one out on the face barge might be below it, or it might be above it.

Q Approximately?

A It depends on the draft of the barges that we are shoving, and at this time I don't recollect just what was the draft on the barges immediately ahead of the Childress, but--

Q Does she have towing knees on her?

A She has four towing knees on her.

Q Does she have any railing around her, on the main deck?

A On the main deck she has a handrailing, well, two of the bulkheads, and you have a life chain running on the outside--

Q With chains?

A They are chains.

Q In the stanchions?

A Well, fron the chains up, and down from the overhead to the deck.

Q How much freeboard did the Childress have on this particular date, do you recall?

A S.. would probably have about three or four feet, approximately, I don't know.

Q How much hose or line did you have on your four inch pump?

A You mean our suction line?

Q Yes?

A We generally keep on the suction on a pump like that-- I think it runs aroun twenty feet or twenty-five foot length suction, other than that. On the suction of a barge pump like that, if you try to put a suction out any further than that, the pump will hardly pick it up unless it is very well primed, or something like that. If you get over one length of suction on the pump, that is more than they can actually pick up.

Q How big is that pump in square footage at its base?

A It is approximately about four feet.

Q Square?

A The thread is about the width of the wheels, and about like that (indicating with hands.) That is the width of the wheels.

Q And how long is it?

A It runs about five feet, that is, the overall length.

Q Assuming that the La Belle was in the position of the barge right on the bow of the Childress on the port side, could you have gotten the pump close enough to the hatch that was opened to have pumped that compartment?

A I would like to clear something. Is that from the pump setting on the--

Q On the deck of the Childress, yes?

A On the deck of the Childress?

Q Yes?

A It would have been a pretty good reach.

Q Of about how far? Would you know?

A No, I wouldn't know.

Q What compartment was it that was being pumped on the barge, Captain?

A On the barge it was the compartment at the time her head end was down, the only compartment that the men could get to, they were aft, setting out towards--from the side, out where I imagine it would be setting away from the side about ten or fifteen feet from the side of the barge.

Q That is forward of amidships or aft of amidships?

A It was sort of forward of amidships.

Q Did you notice how many hatches there were on the LaBelle?

A The inspection at the time I went out, I couldn't determine just how many hatches that the La Belle did have.

Q Did you look for them?

A I did look for more hatches, and I did determine one that was covered up by machinery and equipment, other than the ones that were open.

Q You saw no other hatches that were opened at that time?

A At that time I didn't see no other hatches that open.

MR.KOHLMEYER:

I think that is all.

MR. DUNBAR:

I have no questions.

BY THE COURT:

Q Captain, what time do you usually change watches, with reference to the hours of changing? In other words, on this watch you changed at noon, and how long before noon were you relieved ordinarily?

A Well, that varies, sir. At the time we change watches, the fellow, they ring the bell at 11:30, and that is the first bell, and they ring the second bell, or it would vary a few minutes, and around 11:45, or something like that, and you might be a little difference in time in the clock or not, and that depends on how many men because each week changes watches, and sometimes it is fiveor ten minutes before. Generally it is a little before time to get off watch.

Q Would you say 11:45 is probably right?

A Around 11:45.

Q Now, the La Belle sank at 12:00 Noon, according to your log?

A Around 12:00 Noon, somewhere like that.

Q That is not an accurate time?

A That was just actually an estimate.

Q I see.

Now, when you first saw the La Belle down by the bow, did I understand you right that you then realized that she was in danger of sinking? In other words, when you first saw her, when you first noticed her?

A That isn't just necessarily just noticing of it, or something in the head to be in danger, but that is when I called the mate out there to go down and see and make a check and make certain.

Q Then, did the mate come back and report or did you just go out on the barge yourself then?

A At that time, the mate came up on watch, and he relieved me while I -- he relieved me for a short period while I went out on the barge.

Q How long was it then before you first noticed that the barge was down by the head and the time you actually were aboard the barge itself?

A I would say it was about five or ten minutes, something like that, by the time he come up. He made the length of the tow out there.

Q Where were you when you made the decision to beach the barge? Were you standing on the barge itself?

A Not actually on the barge--I mean the proper place that I was standing when I went to make--he was out there and I instructed him, but as far as standing on the barge, I don't recall whether I was actually on the barge or some of the other barges adjoining it, but I advised him at the time that I was going to top it around, and I proceeded back to the wheelhouse to take over handling and the mate carried out his orders then to top the barge.

Q Do I understand you right, Captain, within five or ten minutes after you first noticed that the barge was down by the head you decided that she had to be beached?

A I had to get her on the bar, and whether she was sinking or not, I couldn't determine, but I thought it would be best to try to get it up on the bar in case she did.

Q Now, do you know anything that happened in connection with the tow that could have brought about this situation so quickly.

A No, sir, I don't.

THE COURT:

All right, sir.

Are there any further questions?

A. We will recess until 1:00 o'clock.

(Whereupon, Court recessed until 1:00 o'clock.)

o-o-o

AFTERNOON SESSION

THE COURT:

You may proceed.

MR.KOHLMEYER:

We are now calling Mr.Boyd, and, if the Court please, this witness has been in the Courtroom, but we didn't know that we were going to use him, and his only testimony is as to the fact of the records that he doesn't have.

JAMES E. BOYD: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q State your name?

A James E. Boyd.

Q Where do you live?

A 4412 Arthur Drive, New Orleans.

Q By whom are you employed?

A By the Mississippi Valley Barge Lines.

Q In what capacity?

A Terminal Superintendent.

Q Where?

A At New Orleans.

Q Do you hold any licenses from the Coast Guard?

A No, sir.

Q Are you a mariner?

A No, sir.

Q Do you have anything to do with the operation of the vessels of the Mississippi Valley Barge Line Company?

A I don't quite understand that.

Q I mean the physical operation of the towboats or tows?

A No, sir.

Q Did you ever handle a towboat?

A No, I haven't.

Q What do you do in connection with the makeup of tows, Mr. Boyd?

A Well, I am in daily contact with our St. Louis office. We discuss the tows. They lay them out in blocks and give me the tentative tow formation.

Q What do you do with that information?

A I pass it on to the captain on arrival at New Orleans.

Q Is that the same procedure that was followed by Valley in 1954?

A That is right.

Q Do you make any memoranda of those tow formations?

A Yes, I do.

Q Are they permanent records?

A Well, no.

Q How long do you keep those records?

A Well, I have no set time for it, but just when my file is full, I usually pull out a handfull, and that is it.

Q Have you made a search in your office for any records concerning the tow of the Childress, leaving New Orleans on December 10th, 1954?

A I did, this morning.

Q Do you have any?

A No, my oldest record is November, 1955.

Q If a master should not agree with your layout of the tow, does he have the authority to change the proposed layout?

A The master has the final word on the tow makeup.

Q So that it is fair to say that you simply propose the makeup, is that correct?

A That is right.

MR. KOHLMEYER:

That is all.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Mr. Boyd, do you remember who in the St. Louis office passed on the information to you concerning the makeup of the

Childress tow?

A I don't believe I could say. I have talked to several people, but I just don't remember that far back.

Q Well, in December, 1954, what individuals in the St. Louis office did that work?

A Well, it was Mr. Maguri, and I think from time to time it might have been Ed Lipps.

Q Do you know which of those two gentlemen passed this information on to you?

A On this particular tow I just don't remember.

Q Did they know in the St. Louis office what equipment was loaded on the La Belle?

A Well, I assume they did. I can't be too sure if they knew all the equipment that was on there.

Q Do you know whether they knew in the St. Louis office the tonnage of the equipment that was on the La Belle?

A Well, I would assume so, because St. Louis told me that we would take it up in our tow. I didn't know it up until that time.

Q Would your assumption be the same if I told you that other wiensses have testified that Valley did not know what equipment was on the barge at the time it was taken in tow, and that subsequently that information was obtained?

A I just don't know. I had no itemized list myself. I didn't know every piece that was on there.

Q When they are preparing a diagram of Valley's tows do they ordinarily know the tonnage of the cargoes on the various

barges?

A Oh, yes, ordinarily it is our own equipment.

Q So if in this instance they did not know what cargo was on the barge, that would be an uncommon occurrence?

A Well, I am sure they know pretty well the tonnage of a barge if they are shipping it in tow, I would assume.

Q Could somebody properly prepare a diagram of a proposed tow if he did not know the tonnage of the carge on the barge?

A Well, I am thinking now of our barges, and, of course, when I know the tonnage on our barges, I know how much freeboard there is, and I would assume they would go by the freeboard on the barge in making up a tow rather than the tonnage. I'm talking about an outside barge, not one of ours.

Q Well, is it possible to know the freeboard of the barge if you don't know what cargo is loaded on it?

A Yes. I mean a hull like that, a certain number of tons would not indicate how much it is going to draw, if he don't know the depth of the hull, and the shape of it, and so forth.

Q Mr. Boyd, what inspections are regularly made of barges that are turned over the Valley at its fleet?

A In our fleet we inspect them on arrival.

Q Did you inspect them on arrival in 1954?

A Yes, sir.

Q What does that inspection consist of?

A Looking into all of the wing tanks, and the rakes, and see if there is any water in there; then, if it is a covered barge, to see that the hatches are properly closed, and in

general, mkae sure your barge is in good condition.

Q Who makes that inspection?

A At that time it was Mr. Pierce; he was out fleet man.

Q Do you know whether or not he made an inspection of the La Belle?

A Well, he was on the barge, I know, because when I learned we were to tow it, I asked him to measure it to give me an approximate size, to figure out how it would fit in the tow.

MR. DUNBAR:

I have no further questions.

MR. KOHLMEYER:

That is all, Mr. Boyd.

We would now like to call Captain Sarbeck.

JOHN W. SARBECK: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q State your name?

A John W. Sarbeck.

Q Where do you live?

A I live at 1100 Pacific Avenue, New Orleans.

Q By whom are you employed?

A Federal Barge Lines.

Q How old are you, Captain Sarbeck?

A Thirty-nine.

Q Do you hold any licenses or papers from the Coast Guard?

A Mate's license, first class pilot's license.

Q When was your first class pilot's license issued?

A I think around 1952, I think, if I'm not mistaken.

Q How long have you been working on the river?

A Since 1939 for the Federal Barge Lines.

Q Have you ever been a master of a towboat?

A I have been a master on diesel towboats.

Q For whom?

A Federal Barge Lines.

Q Where are you employed today, right now?

A I am employed as a pilot on boats, on a steamboat. You see, I don't have a master's ticket, and I run relief master, and stuff like that, on diesel boats at times.

Q Have you had occasion to make up many river tows?

A I have.

Q Are you familiar with the Mississippi Valley Barge Line Company equipment?

A Well, not to a great extent. I knew a few of the sizes of the barges, like the jumbo, 195 foot barge, and the standard, 175 foot barge, but as far as the rest of them, knowing the sizes, offhand I don't know them.

Q You hold in your hand, Captain, the log of the Childress on her voyage out of New Orleans, December 10th, which has already been identified and offered in evidence, and I ask you to observe the makeup of the tow on the margin of that exhibit, and I will ask you if you have had occasion to study that before this morning? (Document to witness.)

A I have seen it before, just sitting over there at the table, I studied it before.

Q On that sketch, Captain, you see certain barges there in the lead, which appear to be jumbo barges. Do you recognize them? (Indicating on chart.)

A Yes, that's 602, 602 and 618, and 622, and 705, looks like they appear to be jumbo barges, and 724, 604, and 761, they all look like they appear to be jumbo barges.

Q How about the first eight barges forward of the Childress?

A Well, the way this diagram is, they appear to be standard, I would say.

Q What is the dimension of a standard barge?

A 175 x 26.

Q What is the width of a jumbo?

A 35.

Q Do you see in there the MV 112?

A Yes, I do.

Q For the purposes of this testimony, Captain, please assume that the 112 is 132 x 35, and the CT 308, please assume is 175 x 26. Do you see that barge also?

A Yes, I see that. (Viewing document.)

Q I think you have heard the La Belle described here in the past two days?

A Yes, I think they said it was 145 x 35, wasn't it, and 5 foot-5½ depth?

Q If I may correct you, Captain, please assume that the CT 308 is 132 x 35?

A Yes.

Q You notice on this sketch there where you have an indication of which ones were empty and which ones were loaded,

do you not?

A Oh, yes.

Q Now, Captain, assuming that this tow went out of New Orleans and was returning upstream with this makeup to a point north of Baton Rouge, would you state whether or not in your opinion the tow was properly madeup?

A I would think so.

Q Would you state that the La Belle was properly placed in the tow?

A Well, according to the testimony I have heard of the freeboard she had, and all, and the tow, I would say that she was in a proper place in the tow.

Q Would you say that it would have been proper to have put an empty barge in front of the La Belle?

A No, I don't think so, because an empty barge possibly the moorings could have broken, and just come back on top of the barge. If there was an empty barge it wouldn't be as heavy, and only with about an eleven foot depth, and it wouldn't be drawing over a foot and a half on the water, at the most, and a rake could come over and knock the equipment off the barge, just as well as anything else.

Q Would you say that it would have been proper to have put a loaded barge in front of the La Belle?

A Well, it all depends; on account of the fastenings, I would say it might not have been proper for the fastenings I'd seen in the pictures for holding a loaded barge ahead of there.

Q And the pictures that you are referring to are the

pictures which have been marked Grant-1, 2, 3, is that right?

A Yes, sir.

Q Would you say it would be proper practice in making up a tow, Captain, to place a loaded barge with an eight foot draft in the first position in a string, and then a barge with a three foot draft, and then another loaded with another eight foot draft?

A Oh, no, I don't think.

Q Why not?

A In other words, you are putting an empty barge between two loads. In other words, the load below the barge could just come back on to the empty, or vice versa, and do a lot of damage there. In other words, you want what you call your headlogs to come together on the barges, and if anything does happen to your tow, about the only thing you can break then is your rigging. You wouldn't have to knock holes in your equipment.

Q How high out of the water does an empty barge, such as existed in this tow, lie?

A Well, like I say, an empty like that, if it is this type of Valley barges, they are 195 foot barges, so I would say the empty itself would draw about a foot, anywhere from a foot to a foot and a half. That is about the most.

Q How deep are those barges?

A Eleven foot, I think they are, most of them.

Q Would you say it would have been proper to have placed the La Belle in the first position on the port side, on the face of the Childress in lieu of the CT 504, Captain?

A No, she being an off-sized barge like that, it wouldn't have made the tow uniform. It would have thrown the tow all out of line to start off with. You see, the way he's got the eight barges there, they are all uniform barges, and he makes a solider tow that way. If he was to put that barge back there, it would throw his tow all out of line. I mean he just wouldn't have anything to go by there.

Q Is there anything dangerous about pushing a barge with a three foot freeboard?

A Oh, no. That is done pretty often. You take a barge loaded to capacity, one of these 195 foot barges, they will draw eight feet or better, so that only allows you three foot of freeboard there.

Q Does the fact that the La Belle might have had a model bow instead of a square bow make any difference in your answer?

A Well, it looks like to me that she ought to, by having a model bow, that ought to have helped out by being in the position she was in the tow.

MR. KOHLMEYER:

That is all.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Mr. Sarbeck, do you know Mr. Northon?

A I do.

Q Did you used to sail under Mr. Northon?

A Yes, I sailed under him as mate.

Q Is it customary practice with the Federal Barge Lines for the captain on the various towboats to actually make up the

the tows, or do they get instructions from the office?

A Well, right now, pretty much in the Federal Barge Lines, your tows are being made up. When we come in, they are generally made up, and, in other words, that operation puts us in operation that much faster, but we still can get to make it up our way.

Q When the tow has been made up for you, do you merely pick it up in the manner it is made up?

A That is right.

Q You don't change the positions?

A No, not unless we see something really that was in danger--a barge in dangers, or something like that, but as a general rule we just take them like they are made up.

Q Mr. Sarbeck, if I told you that the barge Mississippi Valley 112, which is directly behind the La Belle in the tow, had a house on it approximately eight feet high, which obliterated a portion of the deck of the La Belle, would you still say that the La Belle was in the proper position in the tow?

A Well, yes, to a certain extent it would still be as long as--I don't say if he couldn't see the La Belle at all--but as long as he could see any part of the La Belle, I think it would be in the proper position in the tow. Many a time we don't see a barge out there in the tow, just through something like you've got there, equipment on the barges.

Q Let me ask you this question; if you knew that there was a pump on the La Belle, would you still leave it in that position where you could only see half of the deck?

A Well, it all depends on conditions. I mean you said "a pump", and this could have been--there could have been six inches of water in the barge, or something like that, and just taking the pump out there and pumping the water out, this barge could still be in a safe condition.

Q Assume that there was a foot and a half or more of water in there, if you will--

A Like I said, if it was no more than--if the barge was leaking badly, I don't think that the barge should be out there, but if not, the water could have accumulated into the barge through rainwater, or stuff like that, or other conditions in there.

Q Assuming that the pump had been on the barge for say ten hours, would you still leave it in that position?

A Well, like I say, it all depends. I would have to know the condition of the barge. I wouldn't leave it in there if I knew the barge was in a condition where she had a hole in it, or sinking, or something like that.

Q What would you do to determine the condition of the barge?

A Well, either the mate would have to notify me to start off with, I imagine, because a man standing watch back in the pilothouse, you know, he can't be out there looking at the barge making water, and standing watch in the pilothouse also.

Q But you would make an effort to determine the true condition of the barge, and find out whether it was taking on water?

A Naturally.

Q Isn't it often customary to place an odd-size barge with relatively small draft actually alongside the river towboat?

A Well, not on upstream. On downstream, yes.

Q Why not when you are going upstream?

A Well, it hampers the performance of your boat. It will slow down your speed of the vessel.

Q You have testified that it would be difficult to put the La Belle in this tow because it was an offsize barge, and because it would be difficult to get a rigid tow, is that correct?

A That is right.

Q Isn't it true that on occasions you make up tows where there are six or seven different type barges?

A That is right.

Q What did you do in those cases?

A Well, I am going just by this man's diagram in this tow here, and that is what I am going by here, in this particular case here.

Q Isn't it possible to take barges of different types and still have a makeup, that is, make up a seaworthy tow?

A Oh, yes, it is possible. Sure it is posible.

MR. DUNBAR:

I have no questions.

MR. KOHLMEYER:

That is all, Captain.

I would now like to call Captain Lowe.

GENTRY S. LOWE, JR.: called as a witness at the instance of the Respondent, having been duly swcrn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q State your full name, please.

A Gentry S. Lowe, Jr.

Q Where do you live?

A 4025 Virgil Boulevard, New Orleans.

Q By whom are you employed?

A By the Mississippi Valley Barge Lines.

Q In what capacity?

A As a pilot.

Q Where were you employed in December, 1954?

A On the M/V L. Wade Childress.

Q As pilot?

A That is right.

Q What papers do you hold from the Coast Guard, or did you hold from the Coast Guard in 1954?

A I have a master of vessels, all gross tons, and steam and motor vessels; first class pilot on Mississippi River from Chalmette, Louisiana to Minneapolis, Minnesota; and on the Ohio River from Cairo to West Virginia.

Q How long have you been working on the river, Captain?

A I started work on towboats with Federal Barge Lines in January of 1929.

Q You worked continuously since that time?

A Well, after some periods that I worked ashore as rigger, ship rigger.

Q Have you had occasion in your work to make up tows on the river?

A Yes, sir.

Q On December 10, 1954, were you on board the Childress?

A Yes.

Q Did you leave the vessel on that day?

A I would like to refer to the log on that.

Q Surely. (Document to witness.) Were you on board that day?

A I was.

Q Did you get off the vessel?

A Yes, I got off and caught the boat later that night.

Q Did you see the tow of the Childress at Coyle's landing?

A No.

Q When was the first time you saw the tow?

A When I caught the boat that night.

Q What time was that?

A I caught the tow up around Walnut Street, about 8:30 that that night.

Q What is your regular watch on the Childress?

A My regular watch is from 12:00 to 6:00.

Q Did you stand your regular watch that day?

A I came on watch that night at 12:00 o'clock and stood until 6:00 o'clock in the morning, that is, on the 11th.

Q Yes, and that would be after you left Walnut Street?

A I came on watch at 12:00 o'clock that night.

Q After you left Walnut Street, I said?

A That is right.

Q Well, prior to the time you came on watch, what were you doing?

A I was resting in bed.

Q When you took your watch did you stand your whole watch?

A Yes, sir.

Q Did anything untoward occur during your watch?

A No.

Q Did you have any collisions?

A None.

Q Did you have any stranding?

A No.

Q What course were you operating in the river northbound?

A I don't understand what you mean.

Q Were you following the sailing line?

A Well, yes, I was in good deep water.

Q During your watch were you at any time in such close proximity to shore as to make it possible for you to smell the bottom, or touch the bottom?

A No.

MR. DUNBAR:

I object to the question as being leading.

THE COURT:

He has already answered the question. The objection is overruled.

BY MR. KOHLMEYER:

Q Was anything reported to you during your watch that night and early morning, Captain, about the tow?

A No.

Q Is it customary for you to walk out on the tow?

A No, I never walk out on the tow.

Q What is your duty? What were your duties?

A My duty is to pilot the vessel and obey the orders of the master.

Q Did you walk out on the tow that night?

A No.

Q Whose duty is it to go out on the tow?

A The mate and the master.

Q Did the mate go out on your watch?

A On my watch the mate was on the tow during the night.

Q Was anyone else on the tow during the night?

A It is a regular practice on the boat that the men working over the tow, at least every two hours they show me the running lights.

Q Was that done on that night?

A Yes, sir.

Q When did you go on watch the next day?

A 12:00 Noon.

Q Do you recall the exact time that you went on watch, Captain?

A I don't know the exact time. I usually go up maybe five, ten, or sometimes fifteen minutes early. I stand around talking to the captain a few minutes before I take over the boat.

Q Do you know whether or not you went up early that morning?

A Yes, I went up probably about ten minutes early that morning.

Q Had you been called to come up?

A They rang a bell at 11:30, and they ring another bell at

a quarter to twelve.

Q Now, at the time that the second bell--first, was there any special call made to you that morning.

A No.

Q What happened when you got up on the bridge or in the pilothouse?

A When I came in the pilothouse the captain was at the wheel, and he was running on a slow bell, and I said, "What is the matter"? He said, "Well, I've got to see about a barge out there, so hold it for me a minute while I go out there."

Q What did you do then?

A Then I took the wheel.

Q Will you relate, please, what happened within the next few minutes in the order that the events took place?

A Well, I kept the boat on a slow bell, just enough to keep the steerageway, and the captain and mate and the deck crew went out on the barge, and they turned the barge around. In other words, held the outside after corner and let the barge fall around on the outside of the barge this was ahead of, and they were putting pumps in it. I believe one pump was runing, and they had another pump over there in it, and the barge was sinking by the stern. It looked like it was getting deeper by the stern all the time, and finally they had to get off and the barge dumped its load and then it broke out of tow and sank.

Q Which way did it dump its load?

A It dumped its load--that would be aft. I don't know whether that was the stern or the bow of the barge, but the equipment dumped back towards the stern of the tow, or towards

the boat.

Q It didn't tip over to the side?

A Not to the side, no.

Q Approximately where were you in the river when that occurred?

A I was, at the time it dumped its load, right under Melodian Point.

Q Captain, I ask that you look at the log that you have there in your hand, and look at the diagram of the tow in order to refresh your recollection, and tell us whether or not in your opinion the tow was properly made up? (Document to witness.)

A I don't have a diagram here.

Q It is on the margin of the log, right where your hand is.

A Oh, yes. Yes, that is the way it is, as near as I remember.

Q In your opinion is that a proper way of making up that tow?

A Yes.

MR. KOHLMEYER:

That is all I have.

Answer Mr. Dunbar's questions.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Captain, is it your testimony that no report was made to you that a pump had been put on the La Belle during your watch?

A Yes.

Q Is it customary on the Childress for the mate on duty to report to the pilothouse when a pump has been placed on a a barge?

A No, that is one of the regular things that they do when they are in tow, they take a pump on a tow, and the mate doesn't usualy make a report to the pilot unless it is something unusual, like say the barge would be in danger of sinking, or something of that sort.

Q Would you consider that a foot and a half of water in the hold of a barge was something unusual?

A Well, no. They don't always report to me when they have a foot and a half of water.

Q I don't think you answered my question. Would you consider that an unusual occurrence? Is that more water than a barge usually takes on?

A Well, at times they have barges with that much water in them, and it is not considered unusual.

Q If the mate had reported to you that there was a foot and a half of water in the La Belle, would you have done anything differently from the way you did it?

A Well, if he had reported that to me, I would have asked him was he watching it to see if the water was gaining any. A lot of times we have water in a barge when we get them out of the fleet, and we pump the water out, and they don't make anymore, because sometimes there is an accumulation of water in the barge like if it had been laying around in the fleet a week or two?

Q Do you know whether anybody was standing by the pump on the La Belle?

A I don't know that. They were out over the tow during the night. The mates patrol the tows. They go over the tows at night and look over the barges, and I couldn't see--the only thing I could see on the La Belle outside of the equipment was the forward, just a small part of the forward rake inside corner.

Q Why was that?

A Equipment had the rest of it blocked from my view.

Q If the mate had reported to you that the barge was taking on water, would you have assigned a man to stand by that pump?

A If he had reported the barge taking on water?

Q If he had reported that the barge had a foot and a half of water in it, would you have instructed him to check and see whether he was gaining or losing with the pump?

A I would have.

Q And how would you make that check?

A With a sounding rod. You sound the barge, and then possibly thirty minutes later or an hour later you sound the barge again.

Q Would you have instructed him to send a man into the holds of the barge to see why the water existed?

A They do that after they pump the water out.

Q It is common practice after the water has been pumped out to send a man down into the barge?

A It is, if the barge appears to be gaining water too fast.

Q Do you know whether on this occasion anybody went down into the holds of the barge?

A No, I don't.

Q The first that you knew anything out of the ordinary was occurring was the following morning, just before noon, is that right?

A That is correct.

Q What was the height of the house on the Barge Mississippi Valley, 112, which was directly behind the La Belle?

A I don't know the exact height of the houses, but they appear to be about at least ten or twelve foot from the deck.

Q Ten or twelve feet from the deck?

A That is just an estimate on my part. I never have seen the figures on the exact height of the house. I know it is taller than my head.

Q Would the fact that the barge 112 had a house taller than your head alter your opinion as to where the La Belle should have been placed in the tow?

A No.

MR. DUNBAR:

I have no further questions.

MR. KOHLMEYER:

I have no questions.

I would now like to call Mr. Turner.

ARTHUR TURNER: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q Will you state your full name?

A Arthur Turner.

Q Where do you live?

A Memphis, Tennessee.

Q On December 10th, 1954, where were you employed?

A On that date?

Q Yes?

A On the L. Wade Childress.

Q In what job?

A Second mate.

Q Where are you employed now?

A With the Mississippi Valley Barge Lines in the Illinois River.

Q On what boat?

A On the Sylvia T.

Q In what capacity?

A Pilot.

Q What were the duties of a second mate on the Childress as of that date, Mr. Turner?

A Well, as of that date we were just leaving port, and usually to check the tow over pretty well, check the wires around, and sound barges.

Q What watch did you stand?

A 6:00 to 12:00.

Q Did you make up the tow at Coyle's?

A I helped, yes.

Q Did you supervise it, or--

A Well, no, not necessarily, but just some of it.

Q Who supervised?

A The first mate.

Q Is that customary?

A Yes.

Q Did you stand your regular watch that night?

A Yes.

Q Did you notice the tow as it was going up stream after leaving Coyle's?

A No, I didn't. I was pretty well busy.

Q What were you doing?

A Just finishing putting--putting the finishing touches on the tow.

Q Who was in your crew?

A Well, the best I remember, it was Shorty Pace, and--

Q How many deckhands did you have?

A I had three.

Q That is the normal crew?

A Yes.

Q And you went off duty that night at 12:00 Midnight?

A Yes, sir.

Q When did you come on duty?

A 6:00 A.M. the next morning.

Q On the next morning did you go out on the head of the tow?

A No, I didn't go all the way to the head; I went and

checked the La Belle, and the mate told me that he had a pump in it.

Q Who told you that?

A The first mate.

Q When?

A That morning, right at breakfast.

Q At what time did you check?

A It was right after 6:00.

Q What did you find when you checked the La Belle?

A The pump was running, but it was pumping out just barely spurting.

Q What pump was that?

A The electric pump in the La Belle.

Q What did you do?

A I shut it off and looked in the other compartment. They had another compartment on the barge that was open. You see, it had another compartment on the barge that was opened, and I looked in both of them.

Q What did you find?

A Just a small amount of water. It wasn't enough to pump.

Q Did you look in any other of the other hatches on the La Belle?

A That is the only two that was opened. The rest of them were covered up.

Q Did you have occasion to check the barge again on your watch?

A Yes, I checked it about twice more that day.

Q What was the first time that you checked it that morning

after the 6:00 o'clock check.

A It was around between 7:00 and 8:0^

Q And what did you do then?

A I looked in and there wasn't enough water to pump at that time, so I didn't plug it in.

Q When was the next check that you made after the 7:00 or 8:00 o'clock check?

A It was after between 9:00 and 10:00.

Q What did you do then?

A It was just still didn't have enough water to pump.

Q When did you check it again?

A That was the last time I checked it.

Q What was the next time that you were on the La Belle after the 9:00 or 10:00 o'clock check?

A If was after lunch, when I went off watch. I went back off watch and the barge was topped around.

Q When the barge was topped around?

A Yes.

Q During the period that you made these three visits at about 6:00, 8:00, and 10:00, how much freeboard did the La Belle have?

A I would say about three feet.

Q Was she riding approximately on even keel?

A On level, yes.

Q Were you called to the bridge or to the pilothouse that morning anytime?

A Yes, just before lunch.

Q What is the signal to get you to the pilothouse?

A One whistle, short.

Q Did you go to the pilothouse?

A Yes, sir.

Q What did you do when you got to the pilothouse?

A The Captain Powell told me he thought something was wrong with the barge out there, and to go check it.

Q What did you do?

A I left there to check it and I met the first mate on the way down there, and he told me, he said he was already here, and he went and checked it.

Q And you did not go back out?

A No, sir.

Q Did you see the barge sink yourself?

A No, sir. The Valley square was alongside, and I got on the other side of it. I seen it as it started to shifting, the shifting on it, and I got away from it.

Q In which direction did the equipment slide?

A It came back this way (indicating with hands.)

Q Say it in words, because they can't put down your motions.

THE COURT:

Was that towards the Childress?

THE WITNESS:

Yes, towards the Childress.

MR. KOHLMEYER:

That is all.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Mr. Turner, you testified that you shut off the pump at a little after 6:00 A.M.?

A Yes, sir.

Q At that time did you go down into the hold to inspect it?

A No, I didn't go down into it, no, sir.

Q Why didn't you go down into it?

A Well, I thought I would just keep checking on it, and if I'd of gotten more water I would have checked it then, but at the time it didn't look like it was taking any water.

Q Isn't it common practice after a hold has been pumped out, for the mate on duty to go down into the hold to see why it has been taking on water?

A That's at times if you are sure that it's taking on water, but I didn't think it was taking on any water.

Q It didn't occur to you to go down into the hold?

A No, sir.

Q And when you checked it at 7:00 or 8:00 o'clock in the morning did you go down into any of the holds then?

A No, sir.

Q What about when you checked it between 9:00 and 10:00?

A No, I just looked in.

Q How much water was in the holds at the time of that last check?

A It wasn't over three inches, on account of they have a

strainer on the bottom of the pump, and it wasn't up over that.

Q At the time you made these three checks did you take the hatches off of any of the other holds, and look into them?

A They couldn't be taken off.

Q Why couldn't they?

A The equipment was on some kind of boards, and the equipment was setting on top of it.

Q Are you certain about that?

A Yes, sir.

Q Did you make a careful check to see if any of the other hatches were uncovered?

A Yes, I looked it over myself.

Q And even though you knew you could not enter the other holds, you made no effort to enter the two holds that you could enter?

A No, sir.

Q Did the electric pump run at any time from 6:00 A.M. in the morning until it was put back in use at about noon?

A No, sir.

Q At any time did you make any soundings to see what the depth of the water in the hold was?

A No, I just looked in there.

Q Is it common practice to make soundings?

A Yes, as a rules, yes.

Q Did it occur to you that it might be wise to bring some additional pumps out on the barge?

A No, the barge wasn't in any trouble.

Q To your knowledge did anybody else check the barge after you made your last inspection somewhere between 9:00 and 10:00 o'clock in the morning?

A You say after? To my knowledge, they didn't, no. I checked the barge myself. I had a man checking the tow, sounding the rest of the barges, and he might have went over there and looked in it himself, I'm not sure about that.

Q What was that man's name?

A Harry Franks.

Q Is he here today?

A No, sir. I told him not to worry about the La Belle, that I would check it myself.

Q you told him not to worry about the La Belle?

A Yes, I would look at it myself.

Q Did you make any report concerning the condition of the La Belle when you went off watch?

A No, just except when I met the mate, I told him that the captain said that the barge looked like it was in trouble.

Q Did you asign any deckhands to stand by the La Belle at any time during your watch?

A No, sir.

Q Was any lookout maintained at the head of the tow?

A No, sir.

Q During the course of the routine inspections that are made of the tow, do the deckhands look into the hatches or take soundings?

A Yes.

Q They do?

A Yes.

MR. DUNBAR:

I have no further questions.

MR. KOHLMEYER

I have no questions.

We would now like to call Mr. Mosley.

JOHN MAYNARD MOSLEY: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q State your full name.

Q. John Maynard Mosley.

Q Where do you live?

A 621 North Sixth, Memphis, Tennessee.

Q What job do you hold now?

A Deckhand.

Q For whom?

A Right now I am off on days.

Q If you were on duty, where would you work?

A I was on Valley boats the last time, Cincinnati--

Q You mean the Mississippi Valley Barge Line Company?

A Yes.

Q On December 10th, 1954, what were you doing?

A Deckhand.

Q On what boat?

A On the motor vessel L. Wade Childress.

Q What watch did you have?

A 12:00 to 6:00.

Q 12:00 to 6:00?

A Yes.

Q Did you stand your regular watch on the night of December 10th, 1954?

A Yes, sir.

Q Do you recall the movements of the Childress on that date? I mean where you were going and what your tow was?

A I don't particularly remember the exact place, I don't imagine, but in New Orleans we picked up a tow.

Q Did you assist in making up the tow in New Orleans?

A It was a stripped tow--

Q But did you actually help to make it up?

A After midnight.

Q Do you recall picking up any barges on your watch that night?

A No, sir.

Q Now, when you were on watch that night, after you had left New Orleans, you stood the 12:00 to 6:00 watch, is that right?

A Yes, sir.

Q Who was the mate on duty?

A The mate was John Lowder.

Q You recall the Barge La Belle?

A Yes, sir.

Q Did you go on that barge yourself that night?

A Yes, sir.

Q About what time did you go on?

A I guess around 2:00 o'clock, somewhere around in there.

Q What did you see when you went on the barge?

A Well, the mate told us to get a pump and put it in the hatch, that it had water in it.

Q What hatch was that?

A The starboard hatch.

Q Forward, aft, or amidships?

A Forward was the only one I could see then.

Q What was the freeboard on the La Belle at that time?

A I don't know--I would guess three or four feet, something like that?

Q Was she on even keel?

A Yes. As best I can remember, it was.

Q Did you get the pump?

A Me and the mate.

Q What sort of pump was it?

A Electric pump.

Q You actually carried it out there with the mate yourself?

A Yes, sir.

Q Did you see the pump operating?

A Yes, sir.

Q At what time was this, about?

A Around 2:00 o'clock, somewhere in the neighborhood of there.

Q Did you go out on the La Belle again on your watch?

A Yes, sir.

Q At about what time?

A Oh, I don't know--it seemed like forty-five minutes, an hour, something like that later.

Q Did you go with the mate?

A Yes, sir.

Q What did you all do?

A Put a hose on the pump.

Q What pump was this hose put on?

A Some of the water was running back in the hatch. It was coming out of the pump, that the pump was pumping out, and we put a hose on it to run it over the side.

Q After you put the hose on, where was the water discharged?

A Over the side, in the river.

Q Did you go back on the La Belle after that?

A Yes.

Q About what time?

A I don't know--maybe an hour and a half or two hours later.

Q What did you do then?

A Make sure the pump was still pumping.

Q Was it pumping?

A Yes.

Q You saw it pumping yourself?

A Yes, sir.

Q Were you alone or with someone?

A I don't think another deckhand--I'm not sure now.

Q After that did you go out on the La Belle anymore?

A No, it was time to change watches.

Q Did you check the amount of water in the hold of the La Belle at the time you were out there the last time?

A I looked down in it and it didn't seem to be much water in it. I looked down in the hatch, and it didn't seem to be much water left in it.

Q Was there more or less water in there then than when you had put the pump in?

A A lot less.

Q When did you go on your next watch?

A A few minutes before 12:00, that day at noon.

Q Did you go on the La Belle at that time?

A Yes, sir.

Q What was happening then?

a Well, she was nosing down.

Q Who was the last man to leave the La Belle?

A Me.

Q What were you doing on there?

A Trying to get off.

Q Before you were trying to get off, what were you trying to do?

A Trying to save that pump.

Q Did you see the La Belle topped around?

A Yes, sir.

Q Did you have any part in that?

A Yes, sir.

Q What part did you play in that?

A Helped put the fore and aft lines over, and knock the

wires off.

Q What sort of lines did you put on?

A Oh, regular lashing, four or five parts of line.

Q Wire or grass?

A Grass.

Q What did you do after you had lashed her up?

A I went back to the stern of the barge, come alongside, and put it back in line with it.

Q Did you see the equipment slide off of the La Belle?

A I saw some of it.

Q Which way did it slide?

A Sliding down.

Q Away from the tow, or towards the tow, or forward, or aft? How did it slide?

A To the best I can remember, some was going towards the tow, and I was going towards the head of the barge.

Q You didn't see it fall off?

A No, I didn't have time.

Q During the time you were on watch did you hear or feel or see any collision with any vessel or object?

A Not to my knowledge, no.

Q Did you see or feel the tow or the towboat strand or touch the bottom?

A No, not as I can remember.

MR.KOHLMEYER:

That is all.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Mr. Mosley, when you and Mr. Lowder noticed that there was water in the hull of the La Belle at approximately 2:00 A.M., did either one of you go down into the hold?

A No, sir.

Q How did you determine the water was in there?

A We would look in the hatch, and looked in there--we had a flashlight with us.

Q How much water would you estimate was in the hold that you looked in?

A I wouldn't have no way of telling, except when we put the pump in there you could, through the pressure by the pump, I imagine around two feet, something like that.

Q You would say two feet?

A About that, somewhere in the neighborhood of that.

Q Did you attempt to uncover any of the other hatches of the barge to see if there was water in those hatches?

A Yes, when we put the pump in there, me and the mate, he walked around the barge, like I was behind him with the flashlight, and we couldn't see nothing but equipment on there.

Q Was any soundings made to see how much water was in the hold?

A Not to my knowledge, no.

Q When you went back at 3:00 A.M. did either the mate or yourself go into the hold?

A No, sir.

Q Were any soundings made then?

A No, sir.

Q Was any attempt made to uncover any of the other hatches and inspect them?

A No, I didn't. The mate may have. I went back on the tow and went to work.

Q Now, the third time you went back, you say the water was lower than when you started the pumping?

A Yes.

Q Could you have gotten into the hold?

A Yes, I imagine you could.

Q Was any sounding made at that time?

A No, I didn't.

MR. DUNBAR:

I have no further questions.

MR. KOHLMEYER:

We have no further questions. That is all.

BY THE COURT:

Q At noon the following day, just before you topped the La Belle around, did you look in the hatch where the pump was?

A No, sir.

Q I wanted to find out how much water there was in there. But you didn't look?

A No, sir.

BY MR. KOHLMEYER:

Q That wasn't your watch at that time, was it?

A 12:00 o'clock, yes. I came on at 12:00 Noon.

Q But not before 12:00 Noon?

A No, sir.

MR. KOHLMEYER:

That is all.

MR. DUNBAR:

No questions.

We would now like to call Mr. Pace.

WILLIAM BERNARD PACE: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as folows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q What is your full name, Mr. Pace?

A William Bernard Pace.

Q Where do you live?

A Cairo, Illinois.

Q What job are you now on?

A Deckhand for the Mississippi Valley Barge Line Company.

Q On what boat?

A I was on the A.B. Haynes.

Q Where were you working on December 10th, 1954?

A I was on the L. Wade Childress.

Q Do you recall that voyage to New Orleans and the tow with the La Belle in it?

A Yes, sir.

Q Where did you pick up your tow?

A At Coyle's landing we picked up part of it.

Q What watch were you on?

A 6:00 to 12:00 watch, the forward watch.

Q Did you assist in making up the tow at Coyle's?

A Yes, I did.

Q Did you see the Barge La Belle?

A Yes, sir.

Q Were you on her then?

A Well, just putting on some rigging.

Q Did anything unusual occur on the 6:00 to 12:00 watch? In other words, when you went on your watch on the morning of the 11th, that is, the day after you left New Orleans, did you have occasion to go out on the La Belle?

A I went out with the crew and the mate shortly after 7:00 o'clock.

Q Were you on the La Belle itself?

A I was on her just a short time putting on a breast wire.

Q About what time was that?

A I would say sometime between 8:00 and 9:00 o'clock.

Q And that is in the morning?

A Yes, sir.

Q What sort of trim did the La Belle have at that time?

A It looked okeh to me.

Q What do you mean when you say "it looked okeh"?

A It was just about riding good--it was riding good, I would say.

Q About how much freeboard did she have?

A Well, I would make a rough estimate, and it had about two and a half or three feet.

Q Did you see whether or not the pump was running at that time?

A It was running at that time.

Q Did you look in the hold?

A No, sir.

Q When was the next time, if any, that you were on the La Belle?

A I wasn't on it anymore.

Q Did you see her being topped around later on that morning?

A No, sir.

Q Where were you when she sunk?

A I was in the quarters. I had gone off watch.

Q At the time that you were last on the La Belle in the morning, was her bow under water at any time?

A No, sir.

Q Are you positive of that.

A Well, I was pretty well all over the tow, and I didn't see no water coming up on her at all.

Q You could have walked all over the deck of the La Belle and not gotten your feet wet, is that right?

A That is right.

Q Are you sure of that?

A Yes, sir.

MR. DUNBAR:

I object to the continued leading of the witness.

THE COURT:

Don't lead the witness.

MR. KOHLMEYER:

I have no further questions.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Mr. Pace, you were out on the La Belle when the tow was being made up at Coyle's landing?

A Yes, sir.

Q Was the La Belle on even trim at that time?

A I would say so, yes.

Q Was any inspection made of the barge?

A I don't know.

Q You didn't look in any of the hatches.

A No, sir.

Q Did you notice how many hatches there were on the barge?

A No, I didn't. I was busy putting on rigging at the time, tightening it up, and I didn't notice.

Q Did you see any hatches?

A I seen two, but I never noticed anymore than that.

Q You didn't look for any hatches?

A No, sir.

Q Exactly what time was it that you were out on the La Belle the next morning?

A Shortly after 7:00 o'clock.

Q Who were you with?

A I don't know exactly. It was the mate and the other two deckhands.

Q Did anybody go down into the hold of the La Belle and

make an inspection?

A I couldn't say. I didn't see none.

Q Did anybody take any soundings?

A I don't know.

Q To your knowledge did anybody take any soundings?

A I couldn't answer that because I don't know. That would be just, more or less, somebody else's word. I didn't see it.

Q You didn't take any soundings?

A No, sir.

Q Did the officer on watch instruct you to stand by the La Belle?

A No, sir.

Q Did anybody else stand by on the barge?

A Not that I know of.

Q Were you ever instructed to look and see if you could find any other hatches?

A No, sir.

MR. DUNBAR:

I have no further questions.

MR. KOHLMEYER:

No questions.

We would now like to call Mr. Pierce.

JOSEPH PIERCE: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q What is your full name?

A Joseph Pierce.

Q Where do you live?

A 3524 Palmyra Street.

Q By whom are you employed?

A The Mississippi Valley Barge Line.

Q Who were you employed by in December, 1954?

A The Mississippi Valley Barge Line.

Q What was your job in December, 1954?

A In December 1954 I would check barges, and pump barges, and made reports on all barges that came in and went out.

Q Where were you located?

A At that time we were, our barges were located at Coyle's fleet, at Algiers.

Q Do you recall the Barge La Belle, which went out of here in a Valley tow in December 1954?

A Yes, sir.

Q Did you check that barge?

A Yes, sir.

Q Will you describe, please, the barge for the Court? How you found it?

A Well, I found the barge loaded with two caterpillar cranes, one caterpillar bulldozer, and there were two trucks on the barge--one of the trucks I noticed distinctly was loaded with a Lincoln welder; also, there was large matting or grading that you use that was made out of heavy timber, what I consider, or what I seen that they use mostly when there is soft ground, or anything like that, they use them to ride their caterpillars, cranes, and stuff like that on them, and move them from place

to place.

Q How was that equipment loaded on board?

A On the head of the barge there was a bulldozer, a fairly good size bulldozer, with the blade pointing to the bow end and the blade was down. Then, behind that blade, behind that bulldozer was a crane, a caterpillar crane with the boom pointing aft; then there was some timbers and trucks, and then there was another crane with the boom pointing forward, and then behind that, I venture to say, there was a space, and then there was a small wooden shed commonly used on different jobs, like a tool shed, or something like that, and it was just a small shed, small wooden building like.

Q Did you check the hatches on that barge?

A The only thing I could see in the hatches--I checked them--which we always do, we saw one hatch that was clear, and the other was another hatch on the opposite side of the hull, which was partly fouled. The cover was partly fouled.

Q Did you see any other hatches on the barge?

A No, sir.

Q Did you look carefully?

A I looked carefully for other hatches and didn't find any other hatches. I couldn't see any.

Q How much deck of the barge could you see?

A I venture to say that roughly speaking, I guess maybe about a third, or a little over a third of the deck actually that you could actually see, or get to.

Q What was on the other two-thirds?

A Well, there was just equipment, these caterpillar tractors, these trucks, and these heavy--just, like I say, these heavy mats over--I don't know what you call them, but we call them mats, and they use them for over small soft places in the ground, or in the terrain, wherever they move these caterpillars, and they use them and they pick it up and run a caterpillar on it, and pick it up again and set it over again.

Q Did you measure the La Belle?

A I measured it, but I didn't have--at that time I didn't have available, on that short notice, I didn't have available nothing but a yardstick, and that was all we used on it. I used a regular three foot yardstick, thirty-six inch yardstick.

Q And you measured it with that?

A Yes, sir.

Q Did you take her freeboard?

A Yes, sir.

Q Do you recall the freeboard that the barges had?

A The freeboard on the bow end was about thirty-six inches.

Q And at the stern?

A At the stern she had more freeboard. She was lighter on the stern, about twelve inches lighter--about four feet, or so. Then, amidships--

Q Now, what was the--

THE COURT:

Let him finish the answer. Go ahead and finish.

THE WITNESS:

On the amidships part, I measured it and she had, I think

it was about eighteen inches, or so, freeboard amidships on the port side; and on the starboard side she had about four or five inches more freeboard than she did on the port side. In other words, she was heavy to the port side.

BY MR. KOHLMEYER:

Q What sort of deck arrangement was there on this barge? Was it the usual type of barge or unusual?

A Well, it was a steel deck, and it was unusual; as far as the barge is concerned, to a certain extent.

Q Why?

A Because of the thing--it never had no cat-walk, and the hatch covers weren't exactly usual, and the hatch covers on it were out of the ordinary.

Q How about the bow and the stern, was that the ordinary kind?

A The bow and the stern was not ordinary either. On the bow end it was kind of raised, and they had a runway built across the bow. In other words, the way it appeared to me, they loaded equipment across the bow, and they had a sort of a runway built.

Q Where was the barge La Belle when you inspected it?

A At the Coyle fleet.

Q Where was the head, upstream or downstream?

A The head was upstream.

Q What was outside of her?

A When I inspected her, there was another barge laying outside of that, but that didn't stay there--they moved it out

that afternoon.

Q Did you see them move the other barge out?

A Yes, sir.

Q Was there any collision between the La Belle and the other barge?

A No, sir.

MR. KOHLMEYER:

That is all.

Answer Mr. Dunbar's questions.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Mr. Pierce, you only noticed two hatches, is that correct?

A Yes, sir.

Q Exactly where were those two hatches?

A Those two hatches were a little forward in the barge. They were forward of the middle of the barge. In other words, I will say on--I know they were forward of amidships. I know that. There was a crane right in between--there was a bulldozer, and then there was a crane, and then them hatches were right there, just about a quarter of the amidships to the end of the barge.

Q Looking from the bow of the barge, if you were standing on the hatch cover on the starboard side, would there be any cargo blocking your vision to the stern?

A Yes, sir.

Q What cargo would that be?

A It was the mats, and then they had that one big caterpillar crane, and on the other side there were the trucks.

Q Do you think this barge only had two hatches?

A Well, I couldn't say, I wasn't familiar with the construction of the barge, and I looked for other hatches, which I always do on any other barge, and I looked for other hatches and I couldn't find any.

Q Did you think it was significatnt that you could only find two hatches?

A Well it could have been in one way, but then again there was so much equipment there that there was a possibility that they were covered with other equipmment, and the equipment was too heavy to move by hand.

Q Did you report to anybody you could only find two hatches?

A Yes, I made a written report on it.

Q Who did you report that to?

A To my immediate superior.

Q Who is your immediate superior?

A At that time it was Mr. J. Boyd, the Terminal Superintendent.

MR. DUNBAR:

I call for the production of that report, if it is in the possession of Counsel.

MR. KOHLMEYER:

In response to the call, we offer Counsel a photostatic copy of the report as made. (Document to Counsel.)

BY MR. DUNBAR:

Q Will you point out which part of this report pertains to the La Belle?

MR. KOHLMEYER:

The whole thing, Mr. Dunbar, is about the La Belle.

BY MR. DUNBAR:

Q Did anybody other than yourself inspect the La Belle?

A Not to my knowledge, no. Not that I know of. Of course, I was the only one with the barge line there. At that time I went aboard, when I was notified that there was a barge that was to be taken in our tow, I went right aboard and made a report, checked it.

MR. DUNBAR:

I have no further questions.

REDIRECT EXAMINATION

BY MR. KOHLMEYER:

Q Mr. Pierce, when did you make this report up?

A I made the report up immediately after I checked the barge.

Q When did you turn the report in?

A I turned the report in that same night.

Q And this is a photostatic copy of the report. (Document to witness.)

A Yes, sir.

MR. KOHLMEYER:

We offer in evidence as Valley-11 the report just identified.

(Whereupon, the document above referred to, marked Valley-11 for identification, was received in evidence.)

MR. KOHLMEYER:

At this time we would like to call Mr. Grant.

ARTHUR A. GRANT: called as a witness at the instance of the Respondent, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOHLMEYER:

Q State your name, Mr. Grant.

Q Arthur A. Grant.

Q What is your occupation?

A Marine surveyor.

MR. KOHLMEYER:

Will Mr. Dunbar admit Mr. Grant's qualifications as an expert marine surveyor and hull man?

MR. DUNBAR:

Yes, I will.

BY MR. KOHLMEYER:

Q Mr. Grant, did you have occasion to look at the Barge La Belle?

A Yes, I did.

Q Where?

A T. E. James landing, after she was raised. That is up at Harahan, and then at Canulette's Dry Dock in Slidell, sometime after.

Q What was the first time you saw her at James landing?

A Immediately after it had been raised. They brought it down there.

Q And the date, do you recall?

A It was January 10th or 11th.

Q When did you see her at Canulette's?

A I'm guessing a little here, but it was about January 13th.

Q Was she put out on the ways?

A She was on the ways.

Q Did you have occasion to take any pictures of the barge when she was either in the water or pulled out?

A Yes, I took pictures at James' landing and again at Canulette's.

Q I show you here a group of pictures marked Grant-1 through Grant 13, respectively, and ask if these were the pictures that you took, or were taken under your direction by your son? (Documents to witness.)

A They are.

MR. KOHLMEYER:

We offer these series of pictures marked Grant 1 through Grant 13, both inclusive.

(Whereupon, the documents above referred to, marked Grant-1, Grant-2, Grant-3, Grant-4, Grant-5, Grant-6, Grant-7, Grant-8, Grant-9, Grant-10, Grant-11, Grant-12, Grant-13, for identification, were received in evidence.)

BY MR. KOHLMEYER:

Q Mr. Grant, when you saw the barge, had any work been done on her?

A At Canulette?

Q Yes?

A They had burned a section of the side out in the ways, where the hole in the bottom was. It was a piece of about two foot square, or about two foot by about five feet.

Q. Do you have any other pictures of the condition of the barge prior to the time that the work had started at Canulette's?

A Yes. I asked them not to do anything until I got there so that I could take the pictures. When I got there and the picture was taken, the thing was burned. I asked Linghrin if he would let me have a copy of his pictures that he had taken before they done the burning, and he sent me a copy of those pictures.

Q How many pictures are there?

A There are three.

Q And you got those pictures from Mr. Linghrin?

A Yes.

MR. KOHLMEYER:

We offer in evidence as Grant-14, Grant-15, and Grant-16, the three pictures just identified by Mr. Grant.

(Whereupon, the documents above referred to, marked Grant 14, Grant-15, and Grant-16 for identification, were received in evidence.)

BY MR. KOHLMEYER:

Q What did those pictures purport to represent, Mr. Grant?

A That is the picture of the hole in the bottom.

Q Before or after this work was done?

A After she was sunk.

Q What is the material coming out of the hole in there?

A That is an old mattress that they had stuck in there, evidently when they put the cement box.

Q Did you have occasion to go inside the barge?

A Yes.

Q Will you tell us what you found in so far as compartmentation is concerned?

A Well, this is an old steamboat hull that was built about 1922, and it was built to be twenty-eight feet beam, I think it was, and then they had afterward shipped her out by putting a sponson on each side about three feet wide. That sponson ran from about forty feet the full depth of the hull, from forty feet each end. The barge itself was subdivided, or the old hull was, with one, two, three, four, five athwartship bulkheads, and three fore and aft bulkheads.

They had built on the end of this barge two outriggers to make a ferry boat of it, and in order to make the deck flush they had fitted a special hatch cover into each of these hatches. They had made steel or castiron hatch covers that they fitted into the hatches so that the automobiles could go over without intereference.

Where they put the blishters on the side of her, they had cut holes in the shell approximately thirty inches square, and then in the bulkhead, the fore and aft bulkheads, where pipes had gone there at the bottom, there were ten inch diameter holes, or openings, about a foot up from each of these, so that water getting into one side could run through these holes to the other. Generally, she was a battered old derelict.

Q How big were the holes in the longitudinal bulkheads?

A They were approximately ten inches in diameter.

Q Did you find any way of getting into the sponsons?

A Yes. They had cut square holes in the skin of the ship into the sponson.

Q How big were those holes?

A Approximately thirty inches square, a rectangular space maybe two feet by thirty, or something like that.

Q How many of those holes were there leading from the skin of the ship into the sponson?

A In the spaces I went down into, there was one in each of those.

Q Approximately how high off the floor of the barge was the bottom of the hole from the skin of the sponson?

A As far as I can remember, it was about two foot six inches.

Q Were the bulkheads, the aforeships bulkheads watertight?

A They were watertight at the bottom but not at the top. There was an opening at the top.

Q I'm sorry, I didn't hear--

A I said they were watertight at the bottom, but they were open at the top.

Q Where there any holes in those bulkheads other than at the top?

A Not that I noticed.

Q Was there any other holes in the hull that you saw when you examined her?

A There was one small hole in the hull that was noticed on the dry dock at Canulette's. I think it was a half inch hole.

The water was running out of it, in the first rake inboard from the bilge knuckle, in the bottom port side, the after end, the water was running out of the half inch diameter hole.

Q Mr. Grant, did you carefully inspect the hull in the way of this new work that was being done when you arrived there?

A I went over the hull generally while she was on the ways.

Q Did you look at the plate surrounding the portions that had been cropped out?

A Yes.

Q Did you notice any marks or scoring or indentation in that plate?

A No, there was nothing. This hole appeared to have been one that was pushed in the bottom by its being loaded on top of a stump, or on top of something of that kind. It was just an isolated hole in this sponson only. It didn't extend into the shell. It just pushed a hole into the sponson.

Q You, of course, have seen the pictures that Mr. Linghrin took of the hole?

A Yes.

Q Will you state, please, Mr. Grant, whether or not in your opinion, based upon these pictures and the view that you saw, that you had of the hull, this hole could have been made while running, and while the barge was under way?

A I would not think so.

Q Will you explain why your answer is negative?

A Well, in order to punch that hole into it, it would be necessary to put a very heavy pressure on the deck of this

barge, and it is very evident that the barge was itself heavily loaded and pushed down, and to have it happen like that, the barge had to be held there rigidly, so it couldn't move while it was happening, like it would have to be when loading the levee machines.

MR. KOHLMEYER:

That is all.

CROSS EXAMINATION

BY MR. DUNBAR:

Q Mr. Grant, you stated that the barge was a battered old derelict. Was its condition such that you would not have taken it in tow if you had been Mississippi Valley Barge Line Company?

A That is a rather hypothetical question. I couldn't possibly make myself speak for Mississippi Valley Barge Line Company, or anybody in authority there, but it was a very old steamboat hull, very rusty, very battered, and it is possible I would have passed it to take a levee machine.

Q But nevertheless, when you inspected it, you found only the two holes; first, the principal hole, and this small one half inch hole?

A That is right, on the bottom.

Q How long would it have taken the barge to fill from the half inch hole alone?

A A week or ten days.

Q So you don't think that the fact that the half inch hold existed had any significance in this matter?

A Very little, if any.

Q Do I understand your testimony to be that you think that this hole occurred while the La Belle was being loaded?

A Either while it was being loaded this time, or at another time; either while it was being loaded or unloaded, at some time when they put a very heavy weight on top of it, while it was on top of a stump, or abutment, or pile, or something.

Q Isn't it a fact that if a hole of this size had existed, that the barge would have taken on water and lost her trim sometime before she did?

A This is a peculiar barge. There is no other barge like it in the world. The sponson on the outside is separated from the hull of the barge by the skin of the barge itself, and the skin of the ship itself extends up say two feet or so to twenty five inches, twenty-six inches, and this hole was pushed in there and the water would only rise in that equal to the light draft of the barge, so as long as it was light, it would only fill this small portion of the sponson (indicating on photograph), which would probably be two or three tons of water. But, then, when they loaded her down, and as that water raised, it eventually got up to the edge of the shell, and filled in to the next space, and then it filled that space up, and then the center line bulkhead not being tight at the bottom, having this ten inch hole, when it got to the top of that, it flooded into the next one; and, when it filled that one, it flooded into the next one, and finally, when they all got filled, the barge went down bodily, and this hole in the outside (indicating on photograph) had free access then into the body of

the barge, and she filled up. Then they noticed that she was going down by the head.

Q This hole was in the starboard sponson, was it not?

A The starboard after sponson.

Q If I told you that this barge had not been used for sometime previous to this particular trip, and that at no time while it was being loaded was it ever starboard side to the bank, would your opinion be the same?

A My opinion would be the same, yes. They don't know when it happened, or when it was loaded.

Q We don't?

A No one ever looked in there.

MR. DUNBAR:

I have no further questions.

REDIRECT EXAMINATION

BY MR. KOHLMEYER:

Q Do you know on what date this barge was last pulled out prior to the time you saw her?

A No, sir.

Q Suppose, Mr. Grant, that pumps had been placed in the hold of the La Belle after she had started going down by the head, and the master had started topping her around, would you care to state whether or not in your opinion those pumps would have done any good?

A After that hole had free access to the inside of the vessel, a dozen pumps wouldn't have stopped it. The hole was about two feet in diameter.

Q So you would have had to have a pump more than two feet to do any good?

A A dozen pumps wouldn't have done any different.

MR. KOHLMEYER:

That is all.

BY THE COURT:

Q I want to get these holes straight, if I can,

First of all, the reference to the hole which you indicated may have been pushed into the bottom of the sponson, that was, of course, on the starboard side?

A Yes, sir.

Q Was that after, amidships, or near the stern?

A Fifty-one feet from the stern.

Q Fifty-one feet from the stern?

A Yes, sir.

Q Now, then, you state that there were holes from these blisters that were cut into the skin or hull of this vessel, and these holes, you say, were approximately two feet by two feet, or--

A Something like that, yes.

Q And how far from the bottom did these holes start?

A I have estimated that about two foot six from the bottom. About two foot six from the bottom.

Q And then, as I understand, all the bulkheads, both longitudinal and aforeship bulkheads were watertight at the bottom, and that none of them were watertight at the top, and that the main bulkhead had a ten inch hole? What did you mean there?

A The fore and aft bulkheads had a ten inch hole, a pipe

hole, evidently, where they had taken a pipe out and left a hole about a foot up from the bottom of each of the three bulkheads right across, so that water getting in to one side could go through there, through those holes, to the other side.

Q And where was that with reference to the bow and stern of the vessel?

A That was abreast of this hole in the (indicating in photograph)-

Q You mean abreast of the hole in the blister?

A The hole in the bottom, yes.

Q Now, other than those three ten inch holes in the three longitudinal bulkheads, which were all longitudinal bulkheads in the vessel, the other bulkheads were watertight at the bottom?

A As far as I could see, yes. Being an old steamboat, there may have been pipe holes, or something in some of them, but I didn't notice.

Q Now, with the theory that you suggest as to how this casualty happened, how do you relate the circumstance that the hatch which was accessible on the starboard side, was pumped dry?

A That may not have been the hatch that they were talking about, but they could have pumped that hatch dry in the beginning, before they started up the river, they could pump it dry because there was no water spilling in it, because once they start up the river it could have spilled over then, and then they could have pumped it comparatively dry. Or, if that

hatch was on the other side--they don't know which was the bow or the port or the starboard on that boat,nobody knows. It all looks alike. But, if they were pumping on the other side, they could pump that down until it got below that ten inch hole, 'till such time as that would makeup again, but even with a ten inch hole they would have a hard time pumping it.

Q I am not sure you were in Court at the time the mate testified, but the evidence shows that at 10:00 o'clock on the morning of the casualty, and the casualty happened within two hours, this particular bulkhead, hatch, was pumped dry, or within three inches of water. If you accept that as a fact, does that square with your theory?

A That wouldn't be in the hatches. The evidence shows that she was down by the head, which means that there was plenty water in there.

Q How does your theory in the case square with the fact that it went down by the head all of a sudden when the hatches were dry?

A Well, when they let her go, this barge from the other barge, that was holding her up temporarily. Then, when they let her go, she went down very quickly and the water surged in there and filled that space and went over the top of this bulkhead and filled the end up, and down she went by the end.

Q That may have been the end result, but the evidence shows that the vessel was down by the head before she was topped around.

A Yes.

Q And apparently she went down by the head all of a sudden.

A Yes. That is what happened. She was fairly well filled with water to put her down by the head. And, she had all this reserve buoyancy on the other end--that was all fairly light--and that was holding her up, and also the fastenings to this barge that she was alongside, was holding her up, so when they let that go to turn around, she went down and the water went through the hole with a surge and filled this place up (indicating on chart), and filled over the top and the other end, and down she went.

Q The problem is, Mr. Grant, that before that vessel got down by the head to such an extent that the master had determined to beach the barge at this location, that before he decided to top her around for beaching, the forward hatch was so dry that the mate stopped pumping it.

A The forward hatch, it probably would have a little water because that wasn't the one that was open to the sea. It was the next one that was open to the sea.

Q The proof shows that the forward hatch when drained, drained the hatches all across the vessel. In other words, when the water was pumped out of the starboard hatch, the port hatch was cleared of water also. That is what the proof shows here.

A Yes. She wouldn't be down by the head if they had pumped the water out.

Q I agree with that.

MR. DUNBAR:

Could I ask one more question, please?

BY MR. DUNBAR:

Q The testimony, Mr. Grant, is that at 6:00 o'clock in the morning both of the holds that they could inspect were clear of water. Isn't it a fact that if somebody had gone down into those holds with a flashlight, that they could have seen what the situation was, and could have determined that the barge--

A If those two holds were not the holds in the vicinity of this hole in the bottom, they could have gone down there and they wouldn't have found anything but a few leaks coming from the bulkheads, or something. It would be relatively dry. They would have had to go down in that hold, the one adjacent, or abreast of the hole in the bottom, and that was full of water, because the boat was down by the head.

MR. DUNBAR:

That is all I have.

BY MR. KOHLMEYER:

Q Mr. Grant, is it your theory, or what hatches is it your theory that they were pumping?

A I don't know. They say only two hatches, and this thing had how many hatches? It has two, four, six, eight, ten, twelve hatches in the decking.

Q If they pumped those hatches dry, as they say, would that affect your theory?

A Well, they were never pumping in the place where the water was.

Q And the athwartship bulkheads were substantially tight, except in so far as the top is concerned?

A That is right.

Q Now, does the name of the action of the water in a situation like that in the sinking of a ship, does it have a special name?

A They call it bilging. That is what sunk the Titanic, the same thing exactly. The water got up in there and they couldn't get it out, and down she went.

Q And you state that under your theory it is not impossible that they actually pumped the compartment that they said comparatively dry?

A That is true.

MR. KOHLMEYER:

That is all, sir.

MR.DUNBAR:

No questions.

MR. KOHLMEYER:

I would like to call Mr. Pierce back for one or two more questions, if I may.

JOSEPH PIERCE: recalled as a witness at the instance of the Respondent, having previously been sworn, was examined and testified as follows:

REDIRECT EXAMINATION

BY MR. KOHLMEYER:

Q Mr. Pierce, you have been sworn already, and you are still under oath.

I show you here Valley-11--

THE COURT:

I wonder if we could have that diagram in evidence that

Mr. Grant made up.

MR.KOHLMEYER:

We will put it in immediately.

THE COURT:

Does that show where the holds are and where the bulkheads are?

MR.KOHLMEYER:

Can we withdraw Mr. Pierce and put Mr. Grant back on?

THE COURT:

Yes.

ARTHUR A. GRANT: recalled as a witness at the instance of the Respondent, having previously been sworn, was examined and testified as follows:

BY THE COURT:

Q Now will you explain what this is (indicating on chart)?

A This is suppose to be the hole in the bottom of the sponson right there, fifty-one feet from the bow. (Indicating on chart).

Q Well, mark that "hole".

A Yes. (Marking document.)

Then, these are the holes in part of this fore and aft bulkhead, the x's.

Q That would be the three little x's?

A Yes.

Then, I have marked here, just for reference, "Thirty inch square," and that was in the skin, in the bulkhead, in between the skin and the sponson, the thirty inch square hole.

Now this is your hatches (indicating)--

Q As I understand it, but for the thirty inch holes shown by these rectangles in this diagram, in other words, but for these thirty inch holes, the longitudinal bulkheads, as far as you know, were watertight?

A More or less, yes..

Q At the bottom?

A They weren't watertight at the top--I'm not sure. I know that I have as a note here that the bulkheads were not watertight at the top.

THE COURT:

We will mark that Grant-17.

(Whereupon, the document above referred to, marked Grant-17, for identification, was received in evidence.)

JOSEPH PIERCE: recalled as a witness at the instance of the Respondent, having previously been sworn, was examined and testified as follows:

BY MR. KOHLMEYER:

Q With reference to Valley-11, which you have identified as your report, is that the customary form of report that you make to the office when you examine barges, Mr. Pierce?

A Yes.

Q Was that made in the regular course of business?

A Yes.

Q When did you turn that report in?

A I turned that report in just as soon, the same day as the tow left.

Q And that report was actually in the office before the

trouble was had with the La Belle tow?

A Yes, sir.

Q You are certain of that?

A Yes, sir.

Q Could you state whether or not any of the other heavy machinery that you saw on board was lashed down?

A I couldn't see whether there was anything lashed down at all. The booms weren't lashed--that I could see, or none of the equipment, and it was just left, evidently put on there and that was it. The trucks the same way.

Q Was it chocked or blocked?

A The cranes were not chocked or blocked.

Q How about the trucks?

A The trucks, they were loaded, and there was a padding which was loaded on one side of it, and the trucks were just up against a matting on one side of it.

Q So the cranes could just be run right on or off?

A Yes, sir.

MR. KOHLMEYER:

That is all.

MR. DUNBAR:

I have no further questions.

MR. KOHLMEYER:

That is our case, if the Court please.

MR. DUNBAR:

I am not certain whether we will avail ourselves of the privilege of calling Mr. Linghrin, but the decision will be made within a day or so.

THE COURT:

I assume that you want to take his testimony, so how long would you want to keep the record open?

MR. DUNBAR:

Not longer than two weeks.

MR.KOHLMEYER:

Probably we could stipulate what Mr. Linghrin would say right now, if the Court please.

MR. DUNBAR:

I don't think we are in a position to do that,frankly.

MR. KOHLMEYER:

I thought that you might have had a written survey and were willing to stipulate it without any examination on our side.

MR. DUNBAR:

If it is agreeable with the Judge, we can work that procedure out probably tomorrow.

THE COURT:

How long do you want to file proposed findings and supporting memoranda? How long do you want?

MR. DUNBAR:

I would like a month, if possible, because I am considering having the record typed up.

THE COURT:

Is that agreeable to you?

MR. KOHLMEYER:

Just as long as we have a few days afterwards to get ours in.

THE COURT:

We are going to have both of them in at the same time, with ten days afterwards to either side to file a reply if either side wants to file a reply. So, with that in mind, we will make it July 9th. We will make it July 9th, and then have for the proposed findings and any supporting memoranda, if Counsel wants to file any, July 23rd; so that would be two weeks for any rebuttal memoranda either side would like to file.

MR. KOHLMEYER:

It is understood that Mr. Linghrin will either be called to testify or not called within the next couple of days?

MR. DUNBAR:

I don't know that he will be prepared to testify within the next couple of days, but we will give you a definite answer as to whether he will be called.

THE COURT:

The understanding is you will know to morrow or the next day whether or not he will be called, and he will definitely be called in two weeks, if he is called?

MR. DUNBAR:

Yes, sir.

MR. KOHLMEYER:

That is agreeable.

And there is no objections to these pictures as being authentic pictures of the La Belle?

MR. DUNBAR:

No objection. They are in evidence.

THE COURT:

Court stands at recess.

(Whereupon, Court recessed.)

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REPORTER'S CERTIFICATE

The undersigned certifies, in his capacity of Official Court Reporter for the United States District Court, Eastern District of Louisiana, the foregoing to be a true and correct transcription of his Stenograph notes taken during the proceddings in the above-numbered and titled case on the 4th and 5th day of June, 1956.

New Orleans, Louisiana, this 14th day of June, 1956.

s/ Vidal G. Apodaca
Vidal G. Apodaca
Official Court Reporter

...ooOoo...

D E C R E E

(Number and title omitted) (Filed: September 2, 1956)

Lemle and Kelleher
Selim B. Lemle
Charles Kohlmeyer, Jr.

Attorneys for Plaintiff and Proctors for Respondent

Phelps, Dunbar, Marks, Claverie and Sims
Charles E. Dunbar, III
John W. Sims

Attorneys for Defendant and Proctors for Libellants

WRIGHT, District Judge:

This litigation presents a valiant but unsuccessful attempt to apply the law of common carriage to a contract of towage and thus avoid the public policy restrictions against

release from liability for negligence clauses in towage contracts.[1] For the reasons hereinafter announced, this attempt fails, not only because certification as a common carrier under the Interstate Commerce Act[2] does not render the law with reference to towage inapplicable, but also because the loss here was caused by improvident care of cargo, which, even under the Harter Act, is excepted from exoneration.[3]

On December 11, 1954, the barge LaBelle, in tow of the M/V L. Wade Childress and loaded with a valuable cargo of contractors' equipment, dumped its cargo and sank in the Mississippi River approximately opposite the Plaquemine Locks. At the time of the casualty the Childress was owned and operated by the Mississippi Valley Barge Line Company. The LaBelle was under bareboat charter to T. L. James & Co., Inc. and Brown & Root, Inc., d/b/a Louisiana Bridge Company, and the cargo of contractors' equipment was owned by T. L. James & Co., Inc.

The LaBelle was a converted ferryboat with a flat steel deck. It was 150' in length by 35' in breadth by 5'6" in depth. When originally built in 1922 it had a beam of 28'. On conversion, a 3' wide sponson, or blister, which ran the full depth of the hull to 40' from each end of the barge, was added to each side. Holes approximately 30" square and approximately 30" from the bottom plating were cut in the side plating

1- See Bisso v. Inland Waterways Corp., 349 U.S. 85.

2- 49 U.S.C. §901 et seq.

3- 46 U.S.C. §190.

of the original barge, leading into the wing compartments adjacent to the sponson. Ten-inch pipes had been run through the three fore and aft bulkheads about 1' up from the bottom of the barge. When removed in conversion, these 10" openings had not been closed. The five athwartship bulkheads of the original hull were watertight up to a few inches of the deck of the barge. The three fore and aft bulkheads were not watertight. Water moved freely from one side of the vessel to the other within the athwartship bulkheads.

On December 4, 1954, one week before the casualty in suit, the LaBelle departed New Orleans in tow for Krotz Springs, Louisiana, where on December 6, 1954 it was loaded with the contractors' equipment.[4] The loading was effected by grounding the forward end of the barge on the bank of the Atchafalaya River and working the equipment aboard. On December 6, 1954, the LaBelle departed Krotz Springs in tow of a pushing tug and arrived without incident at New Orleans on December 8, 1954, where custody of the barge in its loaded condition was accepted by Mississippi Valley. At the time, the LaBelle had a freeboard of approximately 2' port and starboard, 3' at the bow and 4' at the stern. She was in all respects trim and apparently seaworthy.

4- The equipment consisted of:
1- 54B Diesel Bucyrus Erie Dragline;
1- 803 Diesel Koehring Dragline complete with one 2-1/4 cy. Hendricks dragbucket;
1-D8Caterpillar tractor equipped with cable controlled Bulldozer
1- Ford pickup (privately owned) loaded with employees'tool boxes;
1- 8' x 10' Tool house loaded with miscelaneous rigging and rope supplies;
10- New - 5' x 26' crane mats;
1- 200 amp.welding machine on skids;
1- Ford pickup loaded with one 200 amp.Lincoln welding machine and one cutting outfit.

The LaBelle departed New Orleans December 10, 1954 at about 7:00 P.M. northbound up the Mississippi River for Cheatham Dam, Tennessee. It was incorporated as the lead barge in the starboard string in a tow of 18 barges with the towboat, L. Wade Childress, owned and operated by Mississippi Valley, pushing. About 2:00 on the morning of December 11th, the mate, Lowder, discovered water in the port and starboard wing compartments or holds of the barge, forward of amidship. Assisted by a deck hand, he placed a 3" electric pump into the starboard hold through the hatch opening and started pumping operations. At 5:00 A.M., although the pump had gained considerably on the water, there was still about 1' of water in the hold. He allowed the pump to continue running and notified the second mate, who relieved him. Lowder testified that though the pump was placed in the starboard wing compartment, the port wing compartment was being drained by it as well.

At 6:00 A.M. the second mate found that the holds had been pumped dry and stopped the pump. The pump was not started again until about 11:45 A.M. when the master on the bridge saw that the bow of the LaBelle was settling in the water. He instructed the mate to inspect the barge and, on being relieved by the pilot, proceeded to the barge himself. On arriving at the barge, he decided that the barge was so full of water that it should be beached. While the mate was attempting to install pumps through the hatchways which were accessible, the master ordered the barge "topped around", or pivoted around by letting go all lines except the stern lines on the starboard side, so that the barge could be towed high end forward to the beach

on the east side of the river at Melody Point. Within a few minutes, however, the LaBelle dumped its cargo over its bow, broke loose from its moorings and sank, bow end first, into the Mississippi River. Subsequently, the LaBelle was raised. When the barge was inspected on dry dock, an L-shaped aperture in the bottom of the sponson, 2' from the starboard side and 51' from the stern, was discovered. The L-shaped aperture was approximately 30" in size with the two legs of the L approximately 4" in width.

This litigation was instituted by the filing of a civil action by the carrier to recover its transportation charges against T. L. James & Co., Inc. James answered denying liability and counter-claiming for $75,000 covering the loss of the contractors' equipment. Subsequently, James and Brown & Root, doing business as Louisiana Bridge Company, and James, individually, filed a libel in admiralty in which James reiterated the $75,000 claim for loss of the contractors' equipment and James and Brown & Root together, under the name of the Louisiana Bridge Company, additionally claimed $7,500 covering the cost of salvaging and repairing the barge La Belle. The carrier answered this libel denying liability and filing an interpleader under Admiralty Rule 56 against James claiming reimbursement from James of any amount which it might be required to pay because of any unseaworthiness of the barge, LaBelle, or any improper stowage of the cargo, on the theory that James had warranted to the carrier that the barge was seaworthy and that its cargo was properly loaded and stowed.

The carrier contends that the loss in suit was not caused by its negligence or the negligence of its employees, that water entering the LaBelle through the hole in the blister caused it to lose its buoyancy, and that the blister was holed during loading before the barge was delivered to the carrier's custody. In the alternative, it argues that, being a certificated common carrier under the Interstate Commerce Act, shippers are bound by its tariff filed with the Commission and incorporated in the bill of lading, which tariff exonerates the carrier from liability for any negligence on the part of itself or its employees. In any event, the carrier claims the protection of Section 3 of the Harter Act[5] which releases a carrier from liability for errors in navigation or management of the vessel provided the owner thereof exercises due diligence to make the vessel seaworthy. The carrier also maintains that, under its tariff, it is entitled to payment of the freight in spite of the fact the cargo was never delivered.

5 - Section 3 of the Harter Act, 46 U.S.C. §192, reads:
"If the owner of any vessel transporting merchandise or property to and from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

T.L. James & Co. and the Louisiana Bridge Company contend that involved here is a simple contract of towage and that no tariff filed with the Commission, or bill of lading issued pursuant thereto, can relieve the carrier for loss occasioned by the negligence of its employees. They also contend that they are not liable for the freight because it was not earned, because the provision in the bill of lading stating that freight shall become earned and payable at the beginning of the voyage is not enforceable as against public policy, and for the further reason that the bill of lading did not accompany the shipment, was not contemplated by the parties, and, in fact, was not issued until several weeks after the loss.

The history of the fight of the common carrier to relieve itself of the stringent liability imposed by the common law is well known. The history of the fight to exempt towage from common carrier liability is likewise well known. Unsuccessful in their attempt to obtain judicial approval for release from liability clauses in their carriage contracts,[6] the carriers persuaded the Congress to pass the Harter Act in 1893. With reference to towage contracts, the Supreme Court in 1955, having previously exempted the tower from carrier liability,[7]

6- Liverpool and Great Western Steam Company v. Phenix Insurance Company, 129 U.S. 397, 438; Railroad Company v. Lockwood, 84 U.S. (17 Wall.) 357.

7- Stevens v. The White City, 285 U.S. 195.

after bucking and filling for many years[8], finally and definitively held that release from liability for negligence clauses in towage contracts are illegal as against public policy. Bisso v. Inland Waterways Corp., supra. Adjusting its cap to fit the change in circumstance, Mississippi Valley maintains that the contract of towage in suit is a contract of common carriage after all, and that as such it is entitled to the protection of Section 3 of the Harter Act[9] as well as the release from liability provisions of its tariff filed with the Commission pursuant to the Interstate Commerce Act.[10]

The carrier's contention is in the teeth of the opinion of the Supreme Court in Cornell Steamboat Co. v. United States, 321 U.S. 634. In deciding that persons engaged in the business of towage were subject to regulation as common carriers, the three-judge district court there held that "By labeling persons such as plaintiff 'common carriers' * * * they do not become such for all purposes" and that Section 320(d)[11] of

8- Compania de Navegacion Interior, S.A. v. Fireman's Fund Ins. Co., 277 U.S. 66; The Steamer Syracuse, 79 U.S. (12 Wall.) 167. See also Sun Oil Co. v. Dalzell Towing Co., Inc., 287 U.S. 291.

9- 46 U.S.C. §192.

10- 49 U.S.C. §901 et seq.

11- §320(d) of the Interstate Commerce Act, 49 U.S.C.§920(d) reads:

"Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this chapter."

the Interstate Commerce Act shows that Congress "had in mind the difference between the question of liability and that of regulation." 53 F. Supp. 349, 353. The Supreme Court, in affirming the district court, again referred to Section 320 (d) of the Act and stated at Page 637, "The Act *** is designed, not to determine the legal status of vessels for all purposes, but to provide for regulation of the rates and services of competing interstate water carriers***". A study of the Cornell Steamboat litigation through the Commission,[12] the district court, and the Supreme Court leaves no doubt that while a carrier engaged in towage may be required to be certificated under the Act, when that common carrier enters into a contract of towage, that contract is bound, as to liability, not by the law with reference to common carriage, but by the law with reference to towage.

The carrier cites numerous authorities[13] holding that both the carrier and the shipper are bound by the tariff filed with the Commission. These cases, however, refer to rate and related provisions of the tariff. None of them holds that an illegal provision in the tariff is enforceable. Certainly the inclusion of otherwise illegal release clauses in a tariff cannot make such clauses less illegal or more enforceable.

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12 - 250 I.C.C. 301

13 - Lowden et al v. Simonds-Shields-Lonsdale Grain Co., 306 U.S 516; Chesapeak & O.Ry.Co. v. Martin, 283 U.S. 209; New York Cent. & H.R.R. Co. v. York & Whitney Co., 256 U.S. 406; Pittsburgh, C., C & St. L. Ry. Co. v. Fink, 250 U.S. 577; Southern Railway Co. v. W.E. Prescott, 240 U.S. 632; Atchison Topeka & Santa Fe Ry. Co. v. C.E. Robinson, 233 U.S. 173.

The carrier also argues, citing authorities[14], that only the Interstate Commerce Commision has jurisdiction to inquire into the reasonableness of any provision of the tariff, and therefore this court is without jurisdiction in the premises. Here, however, no question of reasonableness is presented. The question presented is the validity, of the release clause in suit. And the Supreme Court has held all release from negligence clauses in towage contracts illegal and unenforceable as against public policy. Bisso v. Inland Waterways Corp., supra.

The release from liability clauses relating to towage contracts and incorporated in the carrier's tariff are, therefore, unavailing to the carrier under Bisso, supra, and Cornell Steamship, supra.[15]. So, also, are the provisions of the Harter Act.[16] Assuming the Harter Act is applicable, the carrier would nevertheless be responsible for the loss. The loss here was a direct result of the failure of the carrier properly to care for the cargo in suit. For such negligence, it

14 - United States v. Interstate Commerce Commission, 337 U.S. 426; Terminal R. Ass'n. of St. Louis v. United States, 266 U.S. 17; Dayton-Goose Creek Ry. Co. v. United States, 263 U.S.456; Director General of Railroads v. Viscose Co., 254 U.S. 498; Northern Pac. Ry. Co. v. Solum, 247 U.S. 477; Loomis v. Lehigh Valley R. Co., 240 U.S. 43; Texas & Pac. R. Co. v. American Tie & Timber Co., Ltd., 234 U.S. 138; Pennsylvania R. Co. v. International Coal Mining Co., 230 U.S. 184; Simpson v. Shepard, 230 U.S. 352; Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U.S. 247; Robinson v. Baltimore & Ohio R. Co., 222 U.S. 506; Aron v. Pennsylvania R. Co., 2 Cir., 80 F. 2d 100.

15- See also Petition of Reliance Marine Transp. & Const. Corp. 89 F. Supp. 272; 1950 A.M.C. 125.

16- The Harter Act, if applicable, would itself make null and void the release clauses in the tariff in so far as they sought to relieve against negligent care of cargo. 46 U.S.C. §190.

may not be relieved from liability. See The Germanic, 196 U.S. 589; 46 U.S.C. §190. The cargo here, assuming this is a carriage contract, was the barge itself as well as its con-- tents, and the loss resulted from the carrier's negligent failure properly to tend the barge.

Irrespective of how or when the blister on the barge was ruptured, the fact remains that water in the hold, forward of the rupture in the blister, was discovered and pumped out the early morning of the day of the loss. Thereafter, instead of standing by the barge and inspecting the hold at regular intervals, water was not again discovered in the hold until the barge itself was noticed by the captain from the wheelhouse to be down by the head. Inspection at this time revealed that water was then in the hold in such quantity that a decision was made immediately to beach the barge. In an attempt to beach the barge after topping it around, the barge dumped its cargo into the river and sank. Allowing the barge to become so full of water that it was down by the head and in danger of sinking, particularly after being put on notice that the barge was making a controllable amount of water, is negligence of the grossest kind. Curtis Bay Towing Co. v. Southern Lighterage Corp., 4 Cir., 200 F. 2d 33; F. E. Grauwiller Transp. Co. v. Exner Sand & Gravel Corp., 2 Cir., 162 F. 2d 90; Henry Du Bois Sons Co. v. Pennsylvania R. Co., 2 Cir., 47 F. 2d 172. It was the direct and proximate cause of the loss in suit.

Carrier's expert's gratuitous speculation that the hole was punched in the blister during loading at Krotz Springs will

after which the barge was delivered to Coyle at New Orleans at 4:00 A.M., December 8th, being towed loaded downriver from Krotz Springs. Inspection by carrier personnel at New Orleans indicated that the LaBelle, as loaded, was in satisfactory condition for towage upstream to Cheatham Dam, Tennessee. Water was first noticed in a forward hold of the vessel on the early morning of December 11th and the hold was pumped dry in a few hours. The LaBelle sank at noon the same day. On these facts, a finding of seaworthiness of the LaBelle at the time of its delivery to Coyle could easily be supported. The fact, however, that the LaBelle, prior to her loss, was making a controllable amount of water which the carrier negligently failed to control makes the finding of seaworthiness at time of delivery to the carrier's custody unnecessary. Assuming unseaworthiness, the proximate cause of the loss was, not unseaworthiness, but negligent failure to control the water in the holds. Curtis Bay Towing Co. v. Southern Lighterage Corp., supra; F. E. Grauwiller Transp. Co. v. Exner Sand & Gravel Corp., supra; Henry Du Bois Sons Co. v. Pennsylvania R. Co., supra.

The carrier's suggestion that water shipped through the ruptured blister caused the barge suddenly to go down by the head and sink is unacceptable. The rupture in the blister was 51' forward of the stern of the 150' vessel. The hatches, port and starboard, through which the mate discovered water in the hold and pumped it out, were forward of amidship. Water may have been able to find its way from the blister to the body of the barge itself through the 2' x 30" holes in the skin of the [illegible]

the three longitudinal bulkheads, across the width of the vessel.[17] But before that water could move forward, it had to rise almost to the deck of the barge in order to overcome the watertight athwartship bulkheads. Obviously, if the holds forward of amidship were kept dry by pumping, as they apparently could have been, no water would have reached the necessary height therein to pass over the watertight bulkhead into the next hold forward. Unless the water did so, the vessel would not have become down by the head and in danger of sinking. In other words, if the crew of the Childress had kept the water out of the holds by proper use of the pumps in the hatches which were accessible, sufficient water would not have been shifted forward to cause the vessel's bow to dive.

Finding the carrier responsible for the loss renders moot its claim for freight. Holding T. L. James & Co. for the freight would only increase its damage collectible from the carrier.

Decree for libellants in the Admiralty action, for respondent in the impleader, and for defendant in the Civil Action.

New Orleans, Louisiana, September 25, 1956.

s/ J. Skelly Wright
United States District Judge

17 - Carrier's expert testified that, with the exception of the three 10" holes, the longitudinal bulkheads were "more or less" watertight. The proof shows, however, that when the mate, Lowder, pumped out the hold forward of amidship on the starboard side, it drained the corresponding hold on the port side as well.

INTERLOCUTORY DECREE

(Number and title omitted) (Filed: October 31, 1956)

This cause having come on for final hearing on the pleadings and proofs of the respective parties, and having been submitted by the respective proctors, and the Court, after due deliberation, having handed down its opinion in writing on September 20, 1956, holding that the loss and damage to the Barge LA BELLE and its cargo of contractors' equipment, referred to in the libel was occasioned solely by the fault of the M/V CHILDRESS and the respondent, MISSISSIPPI VALLEY BARGE LINE COMPANY, and directing a decree for the libellants herein.

NOW, on motion of proctors for the parties, it is

ORDERED that the opinion of the Court, heretofore filed on September 20, 1956, be and hereby is accepted as the Court's Findings of Fact and Conclusions of Law, pursuant to Supreme Court Rule 46½; and

On motion of proctors for libellants, it is

ORDERED, ADJUDGED AND DECREED that libellants recover of and from the M/V CHILDRESS and from respondent, MISSISSIPPI VALLEY BARGE LINE COMPANY, the damages sustained by libellants by reason of the matters and things alleged in the libel herein, with interest at the rate of five (5%) per cent per annum from December 11, 1954, until paid, and costs; and it is further

ORDERED, ADJUDGED AND DECREED that if the parties hereto do not agree on the amount of damages due to the libellants herein, then on the motion of any party hereto, the matter be referred to Edmund McIlhenny, as Commissioner, to determine the amount of such damages: and it is further

ORDERED, ADJUDGED AND DECREED that the petition of impleader filed herein by respondent, MISSISSIPPI VALLEY BARGE LINE COMPANY, against libellant, T. L. JAMES & CO., INC., be dismissed at petitioner's costs.

New Orleans, Louisiana, November 5th, 1956.

s/ J. Skelly Wright

APPROVED AS TO FORM:

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS

BY: S/ Charles E. Dunbar, III
Proctors for Libellant
420 Hibernia Bank Building
New Orleans 12, Louisiana

LEMLE & KELLEHER

BY:S/ Selim B. Lemle
Proctors for Respondent
National Bank of Commerce Building
New Orleans 12, Louisiana

..oooOoo..

NOTICE OF APPEAL

(Number and title omitted) (Filed: November 19, 1956)

SIRS:

Please take notice that Mississippi Valley Barge Line Company, defendant in the above-styled and numbered matter, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment in favor of plaintiffs which was entered herein on November 1, 1956.

LEMLE & KELLEHER

BY:S/ Selim B. Lemle
Selim B. Lemle
Proctors for Mississippi Valley Barge Line Company,
1836 National Bank of Commerce Bldg., New Orleans 12, La.

ASSIGNMENT OF ERRORS

(Number and title omitted) (Filed: November 19, 1956)

1. The Court erred in holding that the transportation contract between T. L. James & Co., Inc., and Mississippi Valley Barge Line Company was a contract of towage and not a contract of carriage.

2. The Court erred in holding that the movement of the cargo of contractors' equipment loaded aboard the Barge LA BELLE was towage and not common carriage.

3. The Court erred in failing to give effect to Section 3 of the Harter Act and failing to exonerate Mississippi Valley Barge Line Company.

4. The Court erred in failing to give effect to the tariffs of Mississippi Valley Barge Line Company and to the terms and conditions of the bill of lading issued and delivered to the shipper, T. L. James & Co., Inc.

5. Alternatively, if the movement were towage, then the Court erred in finding negligence on the part of Mississippi Valley Barge Line Company in the performance of such towage.

(s) LEMLE & KELLEHER
(s) Selim B. Lemle
Proctors for Mississippi Valley Barge Line Company, Respondent

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STIPULATION FOR DESIGNATION OF RECORDS ON APPEAL

(Number and title omitted) (Filed: November 19, 1956)

It is hereby stipulated and agreed by and between record counsel for the parties in the above-styled and numbered

proceedings as follows:

The transcript of the record in the first of the cases in caption (Admiralty Docket No. 2901) shall contain and include only the following:

A. The libel, answer and 56th Rule petition;

B Transcript of the proceedings before the District Court, including all testimony and exhibits; those exhibits which it would be impracticable to copy, and particularly, without limitation, sketches and the tariff of Mississippi Valley Barge Line Company, are to be transmitted to the Court of Appeals in the original, and an order of the District Court authorizing such action shall be obtained;

C. The opinion of the District Court;

D. The interlocutory decree;

E. Notice of appeal (the appeal bond to be omitted);

F. Assignment of error;

G. This stipulation.

The transcript of the record in the second of the cases in caption (Civil Action No. 5320) shall contain and include only the following:

A. Complaint and answer;

B. Final decree;

C. Notice of appeal (appeal bond to be omitted);

D. This stipulation.

It is stipulated and agreed that in the Court of Appeals these two cases may be heard together and that in the disposition of the second case in caption full and unrestricted

reference may be made to the transcript of the record filed in the first case in caption.

LEMLE & KELLEHER,

(s) Selim B. Lemle
Attorneys and proctors for
Mississippi Valley Barge Line Co.

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS

s/ Charles E. Dunbar, III
Attorneys and proctors for
T. L. James & Co., Inc., and
Brown & Root, Inc., individually,
and doing business under the
name of Louisiana Bridge Company

...oOo...

EXHIBIT "Valley 2"

December 8, 1954

Mr. J. E. Walters
Brown & Root, Inc.
4100 Clinton Drive
Houston, Texas

Dear Mr. Walters:

This will confirm recent conversations concerning your barge LA BELLE and subsequent emptys which you desire to move from New Orleans to Cheatham Dam, Tennessee, and return.

We will pick up the LA BELLE Saturday, December 11th. The rate will be $6.30 per net ton, plus 15 per cent general increase, plus 3 per cent tax, minimum weight 300 tons. It is understood that we will bill the T. L. James Co., Inc., Ruston, La., to your attention.

Concerning the empty barges which you wish to move to the same destination the latter part of the month, the following rates would apply: We will move these barges free of charge, providing they are reloaded and tendered to us for movement back to New Orleans within 20 days after their arrival at Cheatham. The rates applicable for the loaded movement are as follows:

$5.01 - 500 ton minimum
5.79 - 400 ton minimum
7.05 - 300 ton minimum

The above rates are subject to 15 per cent general increase, plus 3 per cent transportation tax.

Yours very truly,

F. E. Thompson
General Agent

FET:rs
bcc: V.J.Angell - SL
R.L. McGirl - SL
J.A. Waterson - NO
W.J. Choat - SL

Note: The movement Saturday is the equipment required to dissemble a cement plant at Cheatham. The equipment and the cement plant will be loaded in the barge LA BELLE as well as the 3 emptys following later and shipped to New Orleans for the Lake Pontchartrain Bridge.

...oOo...

EXHIBIT "Valley 3"

WESTERN UNION SENDING BLANK

HOUSTON, TEXAS TUL DECEMBER 8, 1954 10:10 AM

MR. J. E. WALTERS
ROOSEVELT HOTEL
NEW ORLEANS, LA.

WILL MOVE BARGE LA BELLE DEC. 11TH TO CHEATHAM RATE 6.30 PER NET TON PLUS 15% MINIMUM WEIGHT 300 TONS. WILL MOVE SAID EMPTYS LATER IN MONTH FREE OF CHARGE PROVIDED THEY ARE RELOADED AND TENDERED BACK TO US FOR MOVEMENT TO NEW ORLEANS WITHIN 20 DAYS AFTER ARRIVAL AT CHEATHAM. PLEASE ADVISE ACCEPTANCE.

F. E. THOMPSON MISSISSIPPI VALLEY BARGE LINE

...oOo...

EXHIBIT "Valley 4"

WESTERN UNION

.NSA250

NS. LLH067 PD-NEW ORLEANS LA 8 112 PM
MISSISSIPPI VALLEY BARGE LINES
ATTN F. E. THOMPSON HOU-
RETEL CONSIDER THIS FORMAL ACCEPTANCE YOUR OFFER OF BARGE MOVEMENT TIME IS IMPORTANT SO PLEASE RUSH SHIPMENT ALL POSSIBLE FORWARD CONTRACT COVERING MOVEMENT MY OFFICE HOUSTON TEX--

J E WALTERS --

...oOo...

EXHIBIT "Valley 5"

HOUSTON Dec. 29, 1954

MR. J. A. WATERSON:

This will confirm the information given to you over the telephone today.

One only 54-B Diesel Bucylus Erie Dragline weight 140,000#.

One only 803 Koehring dragline equipped with one Hedricks 2½ yard drag bucket weight 110,000#.

One only D-8 caterpillar tractrr with cable control bull-dozer weight 44,000#.

One only Ford pickup loaded with one - 200# Lincoln welding machine and one cutting outfit.

One only Ford pickup loaded with employees' tool boxes.

One only 8' x 10' tool house with miscellaneous rigging and tool supplies.

Ten new 5 x 26 crane mats.

One only 200 amp welding machine mounted on skids.

Estimated weight on the pickups, tool house, mats and welding machine 15,000#.

JED:rs J. E. Dullahan

...oOo...

EXHIBIT "Walters 2"

COPY

MISSISSIPPI VALLEY BARGE LINE CO.

520 City National Bank Building

Houston, Texas

December 8, 1954

Mr. J. E. Walters
Brown & Root, Inc.
4100 Clinton Drive
Houston, Texas

Dear Mr. Walters:

This will confirm recent conversation concerning your barge LABELLE and subsequent emptys which you desire to move

We will pick up the LABELLE Saturday, December 11. The rate will be $6.30 per ton, plus 15% general increase, plus 3% tax, minimum weight 300 tons. It is understood that we will bill the T. L. Jones Co., Inc., Ruston, Louisiana, to your attention.

Concerning the empty barges which you wish to move to the same destination the latter part of the month, the following weights would apply: We will move these barges free fo charge, providing they are reloaded and tendered to us for movement back to New Orleans within twenty days after their arrival at Cheatham. The rates applicable for the loaded move are as follows: $5.01 - 400 ton minimum; $5.79 - 400 ton minimum; $7.05 - 300 ton minimum.

The rates are subject to 15% general increase. plus 3% transportation tax.

Yours very truly,

s/ F. E. Thompson
General Agent

...oOo...

EXHIBIT "Walters 3"

McDONOUGH MARINE SERVICE
A Division of McDonough Construction Co.
Parkersburg, West Virginia

December 1, 1954

Mr. J. E. Walters
Brown & Root, Inc.
4100 Clinton Drive
Houston, Texas

Dear Mr. Walters:

This is to confirm rental to your company of the following barges:

LaBelle Hull	size 150' x 35'
LTC - No. 1	size 180' x 36'
LTC - No. 2	size 180' x 36'
LTC - No. 3	size 180' x 36'

The rental is $500 per month per barge, and the minimum term is eighteen months. The Hull and P. & I. insurance is for the account of your company.

The LaBelle hull is ready for pickup this evening on tomorrow morning. We have called in the other three barges from the present charterer, and they will be available around the middle of the month.

The barges are to be returned to our landing on the Industrial Canal in New Orleans at the end of this charter in the same condition received, reasonable wear and tear excepted.

Kindly signify your acceptance of this charter by signing and returning the attached copy of this letter.

Very truly yours,

s/ B. P. McDonough
BPM:mh

ACCEPTED:
Louisiana Bridge Co.
BROWN & ROOT
BY S. J.E.Walters

...oOo...

EXHIBIT "Walters 3"

COPY COPY

WESTERN UNION
NS. HSB041 PD-FAX HOUSTON TEX 8 1019 AMC
J. E. WALTERS, ROOSEVELT HOTEL
NRLNS

WILL MOVE BARGE LA BELLE DEC. 11TH TO CHEATHAM RATE 6.30 PER MET TONS PLUS 15% MINIMUM WEIGHT 300 TONS. WILL MOVE SUCH EMPTYS LATER IN MONTH FREE OF CHARGE PROVIDED THEY ARE RELOADED AND TENDERED BACK TO US OUR MOVEMENT TO NEW ORLEANS WITHIN 20 DAYS AFTER ARRIVAL AT CHEATHAM. PLEASE ADVISE ACCEPTANCE.

F E THOMPSON
MISSISSIPPI VALLEY BARGE LINE

...oOo...

CLERK'S CERTIFICATE

I, A. DALLAM O'BRIEN, JR., Clerk of the United States District Court for the Eastern District of Louisiana do hereby certify that the foregoing 386 pages do contain a true and correct copy of the record in the case entitled T. L. James & Co., Inc., et al. -vs- Mississippi Valley Barge Line Company" No. 2901 of the Admiralty Docket of this Court, as made up in accordance with the designation of contents copied herein.

WITNESS my hand and seal of said court this 24th day of January, 1957.

(s e a l)

A. DALLAM O'BRIEN, JR., Clerk

By_____
Deputy Clerk

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:-

ARGUMENT AND SUBMISSION.

Extract from the Minutes of April 4, 1957.

MISSISSIPPI VALLEY BARGE LINE COMPANY,

No. 16469 versus

T. L. JAMES & CO., INC., ET AL.

On this day this cause was called, and after argument by Selim B. Lemle, Esq., for appellant and Charles E. Dunbar, III, Esq., for appellees, was submitted to the Court.

OPINION OF THE COURT FILED:-

May 3, 1957.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16469

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

versus

T. L. JAMES & CO., INC., ET AL.,
Appellees.

No. 16470

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

versus

T. L. JAMES & CO., INC.,
Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

(May 3, 1957)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

HUTCHESON, Chief Judge: These two appeals from judgments in related actions, arising out of the sinking of

the LaBelle and consolidated for trial, present for our decision two primary questions: one, whether the district judge correctly held[1] that the sinking was due to the negligence and fault of the appellant; the other, if so, whether the appellant was entitled to invoke the exoneration afforded by Section 3 of the Harter Act and the defensive clauses of the bill of lading.

The answer to the first question depends merely upon an appraisement of the facts in evidence. The answer to the second question depends upon whether the transportation involved was carriage or towage, and whether if it was carriage, Valley was entitled under the circumstances to invoke Section 3 of the Harter Act. The overall answers to both questions depend upon whether the district judge was correct in his determination of fact and of law as to Valley's liability in connection with the sinking of the barge.

This is the origin of the two actions. In December of 1954, T. L. James & Co., Inc., hereafter called "James", engaged in the general contracting and construction business with offices at Houston, Texas, and Kenner, Louisiana, and Mississippi Valley Barge Line Co., hereafter called "Valley", a common carrier by water, which holds an Interstate Commerce Commission certificate,[2] entered into

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1 Mississippi Valley Barge Line vs. T. L. James & Co., 144 F. Supp. 662.

2 The pertinent provisions of which are:

"It is hereby certified, That public convenience and necessity require operation by the Mississippi Valley Barge Line Company as a common carrier, in interstate or foreign commerce, by nonself-propelled vessels with the *use of separate towing vessels in the transportation of commodities generally and by towing vessels in the performance of general towage, between ports and points along* . . .

an agreement that Valley would transport the barge LaBelle, supplied and loaded by James with a bulldozer and other miscellaneous contractors' equipment, from New Orleans, La. to Cheatham Dam, Tennessee, for an agreed upon charge, and would return the barge to New Orleans empty without charge. Enroute the barge careened and dumped its load and then sank in the Mississippi River, thereby precipitating this litigation.

It was initiated by a suit at law filed by Valley against James for the freight money and the Federal transportation tax due thereon for transporting the cargo of contractor's equipment pursuant to a provision in Valley's tariff on file with the Interstate Commerce Commission for the collection and payment of the transportation charges, notwithstanding the fact that the cargo was lost en route.

Subsequently James, as bareboat charterer of the Barge LaBelle, sued in admiralty for its damages allegedly incurred because of the sinking of the barge, and James, together with Brown & Root, Inc., doing business under the name of Louisiana Bridge Company, (hereinafter called "Shippers"), alleging that they were the owners of the contractors' equipment laden on the Barge LaBelle, joined in this admiralty action claiming the damages allegedly sustained by them as such cargo owners resulting from the

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[Here follows a lengthy description of waterways, including the route from New Orleans to Cheatham Dam, Tennessee, over the several waterways involved].

"It is ordered, That the Mississippi Valley Barge Line Company be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or hereafter may be, attached to the exercise of such authority from this Commission." (emphasis supplied).

sinking of the barge. Valley filed a 56th Rule Petition against James alleging that James had warranted that the Barge LaBelle was seaworthy and the cargo properly stowed thereon and demanded that in the event Valley be held liable for loss of or damage to the Barge LaBelle or its cargo, due to unseaworthiness of the barge or improper storage of cargo thereon, Valley be awarded a decree for a similar amount over against James.

In the suit by James and Shippers against Valley for their damages, the District Court entered an interlocutory decree holding that the transportation of the contractors' equipment on the Barge LaBelle constituted towage, and not carriage, and that Valley was liable for damages for negligent towage. The district judge dismissed Valley's 56th Rule Petition against James for alleged breach of warranty of the seaworthiness of the Barge LaBelle and the propriety of the stowage of the cargo thereon. In the suit by Valley against James for its freight money, the district judge held that the question had become moot by reason of his holding that Valley was at fault for negligent towage, since permitting it to recover its freight charges and the transportation tax thereon would simply increase the Shippers' damages. Accordingly, he dismissed Valley's suit against James.

Appealing from these decrees in Docket Nos. 16469 and 16470 of this court, Valley is here thus presenting, under six specifications of error[3] the two prime questions with their corollaries:

> "The principal question presented is whether contract for the transportation by Valley of the

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[3] "1. The court erred in holding that the transportation contract between T. L. James & Co., Inc. and Mississippi

contractors' equipment laden by the Shippers on board its barge LaBelle was carriage or towage. While corrollaries to this principal question are:

"(1) If the movement was carriage and the defense of the exoneration of the carrier afforded by Section 3 of the Harter Act is available, then was there any failure in care and custody of cargo which would render the carrier liable for damage thereto?

"(2) If the transportation of the contractors' equipment constituted towage, was there any negligence on the part of the tower which renders it liable for damage to cargo?

"The second question involved, which necessarily arises if your Honors determine that the transportation of the cargo was carriage, is the status of the movement of the Barge LaBelle. Was it carriage or towage, and what is Valley's liability, if any, for the sinking of the barge?"

Valley Barge Line Company was a contract of towage and not a contract of carriage.

"2. The court erred in holding that the movement of the cargo of contractors' equipment loaded aboard the Barge LaBelle was towage and not common carriage.

"3. The court erred in failing to give effect to Sec. 3 of the Harter Act and failing to exonerate Mississippi Valley Barge Line Company.

"4. The court erred in failing to give effect to the tariffs of Mississippi Valley Barge Line Company and to the terms and conditions of the bill of lading issued and delivered to the shipper, T. L. James & Co., Inc.

"5. Alternatively, if the movement was towage, then the court erred in finding negligence on the part of Mississippi Valley Barge Line Company in the performance of such towage."

While in Docket No. 16,470 Valley assigns as additional error:

"The district court erred in holding that Valley was not entitled to recover its freight charges and the Federal transportation tax thereon from James."

In support of its contention that the transportation of LaBelle with its cargo in tow of a tug is carriage and not towage, appellant plants itself firmly on *Sacramento Navigation Co. vs. Salz,* 273 U.S. 326, a case where, unlike here, the carrier was the owner and operator of both barge and tug. There the Supreme Court, reversing the opinion of the Ninth Circuit, 3 Federal (2) 759, and saying: "Towage service is the employment of one vessel to expedite the voyage of another", went on to say: "Here, while there was towage service, the contract actually made with respondent was not to tow a vessel but to transport goods and plainly that contract was the contract of affreightment."

Based on this decision and arguing that the line of demarcation between carriage and towage is definite and unmistakable, appellant urges upon us that, in disregarding the Sacremento case as controlling and supporting his opinion by citing *Cornell Steamboat Co. v. United States,* 312 U.S. 634, the district judge erroneously rejected an opinion which is controlling on its facts and law, on the basis of an opinion which is without pertinence to the question dealt with here, whether the contract was one of towage or one of carriage.

Realizing the pinch of the argument that in the Sacramento case both barge and tug were owned by the carrier, whereas in this case the towed vessel was not owned by it, appellant seeks to avoid the force of the argument based upon this fact by pointing out that in performing inland water carriage of cargo, a shipper may supply an instrumentality used in the carriage, and, of course, a barge is

such an instrumentality, and cites and relies on In Re: O'Donnell, 26 F (2), where the court applied the doctrine of the Sacramento case to a case in which, while there was no common ownership of the tug and barge, the tug owner and the barge owner were sharing expenses and profits, and, if not actually partners, were participating in a joint venture.

On the question whether there was negligence in the handling of the barge, as the district court held, appellant argues vigorously and long that there was no negligence, and that irrespective of the terms of Valley's tariff, Valley is not liable.

Recognizing that both carriers and towers which tow interstate are subject to regulation under Part III of the Interstate Commerce Act, *Cornell Steamboat Co. v. United States, supra,* and that all common carriers, whether engaged in the carriage of cargoes, are required to file with the commission their tariffs and to include therein any rules or regulations which in anywise change, affect or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the purchasers, shipper, or consignee, appellant points to the fact that Valley did file its tariff and that it contained all the rates, rules, and regulations applicable to freight transported by Valley and consisted of A. B. & C. rates. As a part of this tariff, appellant points to the provision applicable where barges are furnished for transportation, that under "C" rates, which it claims was the rate under which this shipment moved, the customer warrants that barges are seaworthy and properly equipped, and that the shipment is properly stowed

therein. In addition, it points to a provision of the tariff outlawed in the Bisso case,[4] a case of towage, in effect that the towage will be performed solely at the risk of the tow and its cargo, including the risk of negligence of the towing craft, its master, pilot, officers and crew, and of the contractor and its agents, servants, employees and representatives, all of whom in respect to the towage shall become and be the agents and servants of the tow and its owners. So pointing, it seeks to found upon the fact that this provision is in a tariff a claim that it is not subject to the holding in the Bisso case.

The appellees, on their part, standing firmly by the decision of the district judge, urge upon us that it was correct in all respects and that the decree should be affirmed throughout. Taking issue with the appellant as to the effect of the Cornell case, they argue that, though that was a litigation originating before the Interstate Commerce Commission, 250 I.C.C. 301, continuing through the decision of the three judge court, *Cornell Steamboat Co. v. United States*, 53 F. Supp. 349, and concluding with what it calls the landmark opinion in *Cornell Steamboat Co. v. United States*, 312 U.S. 634, whatever force and effect the Sacramento case had, has been destroyed or greatly limited by this decision.

Citing petition of Reliance Co., 89 F. Supp. 272, holding that the existence of a published tariff did not serve to transform a private carriage into a public carriage, they seek to strike down all weight attached by appellant to

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4 Bisso v. Inland Waterways Corp., 349 U.S. 85.

its published tariff. Pointing to the basic finding of the district judge, "This litigation presents * * * an attempt to apply the law of common carriage to a contract of towage and thus avoid the public policy restrictions against release from liability from negligence clauses in towage contracts", appellees cite other recent district court cases, each holding that a contract such as the one here, which was claimed to be one of carriage, was in fact one of towage.

Finally, pointing to the facts: that the opinion in the Sacramento case turned entirely upon the fact that both tow and tug were owned by the carrier; that the Supreme Court held that the contract was not one for towage; that in the O'Connell case, *supra*, the court in effect held that the owner of the tug and the owner of the barge had made a joint contract of carriage with the shipper; appellees point out that the facts[5] here are entirely different.

Because the district judge, in his opinion, fully and adequately set out the facts bearing on the question of negligence in handling the LaBelle, and we agree fully with

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[5] Mr. Walters for James testified: "I contacted Mississippi Valley from Houston requesting them to give me a price for the movement of the barge from New Orleans to Ashland City or Cheatham Locks, Tennessee, and received a minimum cargo rate for 300 tons which was less than the weight of the cargo." Nothing was said about affreightment. Only towage was discussed. Nothing was said about a bill of lading or its contents. The bill of lading was in fact received several weeks after the cargo was lost.

While Mr. Thompson for Valley did say that he mentioned the word "tariff" in the telephone conversation, he admitted that none of the tariff provisions were quoted or discussed, and he did not deny that the subject of the conversation was the movement of the barge.

The confirmatory letter of Dec. 8th, from Thompson to Walters began, "This will confirm recent conversations concerning your barge LaBelle and subsequent empties which

his statements of the facts and his findings on the issue of negligence, we will content ourselves with saying so and that unless appellant is entitled to be relieved from liability under the Harter Act or under some defensive clause of its bill of lading, the judgment must be affirmed. Addressing ourselves, therefore, first to the claim that the clause, exempting it from liability for negligence and in effect purporting to make its own employees the agents of the barge owner, exonerated appellant it is sufficient to say that the validity of this clause has been definitely and conclusively settled against it in the Bisso case, and that, as pointed out in the opinion of the district judge below and in the briefs of the appellees here, the fact that this illegal clause is embodied in a tariff cannot make it legal.

Upon the crucial question, whether the contract was and was intended to be one of towage rather than of affreightment, we are of the clear opinion that no other reasonable view can be taken of the evidence than that the district court took. The fact that both the oral agreement and its written *confirmations provided for moving the barge;* the fact that nothing was said at the time of the contract about the matters now so strongly urged, *that the agreement was not one of towage but one of affreightment;* and the fact that the bill of lading was not issued until sometime after

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you desire to move from New Orleans to Cheatham Dam, Tennessee and return."

The telegram of the same day read, "Will move barge LaBelle Dec. 11, to Cheatham, rate $6.30 per net ton plus 15%. Minimum weight 300 tons."

Walters replied by wire, "Consider this formal acceptance your offer of barge movement."

It was only after the barge was lost that the bill of lading was issued and the present contentions with regard to the contract were put forward.

the loss; not only tends strongly we think to support but also to compel the view that the parties were contracting not for affreightment but for a towage service and that the district judge was right in so holding.

While, therefore, we are inclined to the view that the undisputed facts do not bring Valley within the essential requirements of Sec. 3, "*If the owner of any vessel* transporting merchandise or property to and from any port in the United States, *shall exercise due diligence to make the vessel* in all respects seaworthy * * * " (emphasis supplied), in that Valley was not the owner of the vessel LaBelle in which the merchandise was loaded and Valley did nothing whatever to make the vessel LaBelle seaworthy, and it would be in our opinion a perversion of the statute, which was designed to encourage and require owners to make their vessels seaworthy, to permit Valley to invoke the section in connection with a carriage where it neither owned, nor had part in conditioning, the vessel in respect of which the exoneration is claimed, because of our conclusion that the contract was for towage, we do not express a firm opinion on this point.

Finally, as to the alternative holding of the district judge, that if the contract was for affreightment the LaBelle was itself the cargo, and the provision in the Harter Act which prevents the application of the section, that the lack of diligence which is excused is not with respect to the care of the cargo, defeats its application here, while at first blush the idea seems fanciful, it seems no more fanciful

than the general claim of the appellant that in this kind of case it can escape the consequences of its negligence in connection with the towing of the LaBelle by claiming the protection of the tariff and of the Harter Act. Since, however, we have concluded to affirm the judgment on the ground that the movement was one of towage, it will not become necessary to, and we refrain from expressing a definite opinion on this point.

The judgment was right. It is AFFIRMED.

JUDGMENT.

Extract from the Minutes of May 3, 1957.

MISSISSIPPI VALLEY BARGE LINE COMPANY,

No. 16469. versus

T. L. JAMES & CO., INC., ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Mississippi Valley Barge Line Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * *

PETITION OF APPELLANT FOR REHEARING

Filed: May 23, 1957

United States Court of Appeals

FIFTH CIRCUIT

No. 16,469

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

versus

T. L. JAMES & CO., INC., ET AL.,
Appellees.

No. 16,470

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

versus

T. L. JAMES & CO., INC.,
Appellee.

PETITION BY MISSISSIPPI VALLEY BARGE LINE COMPANY FOR REHEARINGS.

To the Honorable United States Court of Appeals for the Fifth Circuit and the Honorables, the Judges thereof:

Mississippi Valley Barge Line Company, Appellant in the above-entitled and numbered causes, prays that this Honorable Court will rehear and reconsider the matters decided by it therein on May 3, 1957, and cause an order or orders to be made revoking and recalling the decrees made in these cases on said day and grant rehear-

ings therein, and that, after due consideration, this Honorable Court will reverse the decrees granted in these matters by the United States District Court for the Eastern District of Louisiana. The grounds for this petition, common to both causes, are as follows:

I.

The Court erred in finding that the transportation by Mississippi Valley Barge Line Company of the cargo of contractors' equipment on board the Barge LA BELLE was towage and not common carriage.

II.

The Court erred in holding that the shipper, T. L. James & Co., Inc., and the carrier, Mississippi Valley Barge Line Company, could enter into a contract for towage of the Barge LA BELLE laden with cargo, because such a movement is not provided for by the tariff of Mississippi Valley Barge Line Company on file with and promulgated by the Interstate Commerce Commission.

III.

The Court erred in assuming jurisdiction to declare invalid the liability terms and provisions of Mississippi Valley Barge Line Company's tariff on file with and promulgated by the Interstate Commerce Commission, and in failing to hold that such jurisdiction is vested solely in the Interstate Commerce Commission.

IV.

The Court erred in holding invalid the liability provisions contained in Mississippi Valley Barge Line Company's tariff on file with and promulgated by the Interstate Commerce Commission.

In addition to the foregoing, common to both cases, in Docket No. 16,470 the Court erred in failing to hold that if Mississippi Valley Barge Line Company is not liable for the damage to the cargo of the Barge LA BELLE, then Mississippi Valley Barge Line Company is entitled to recover its transportation charges assessed in accordance with the provisions of its tariff on file with and promulgated by the Interstate Commerce Commission and the Federal transportation tax thereon.

Petitioner avers that it is filing in connection with this petition a brief in support thereof; that for the reasons above set forth and amplified in the brief, rehearings should be granted herein; that the opinion and decrees of this Honorable Court rendered on May 3, 1957, should be set aside; and that decrees be entered herein reversing the decrees granted therein by the United States District Court for the Eastern District of Louisiana.

Respectfully submitted,

(s) SELIM B. LEMLE
SELIM B. LEMLE,
Attorney for Petitioner,
Mississippi Valley Barge
Line Company, Appellant.

LEMLE & KELLEHER,
Of Counsel.

CERTIFICATE

I certify that the above and foregoing petition for rehearings is presented in good faith and not for the purpose of delay.

/s/ SELIM B. LEMLE,
Attorney for Petitioner,
Mississippi Valley Barge
Line Company, Appellant.

PETITION OF APPELLANT FOR REHEARING

Filed May 28, 1957

United States Court of Appeals

FIFTH CIRCUIT

No. 16,469

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

versus

T. L. JAMES & CO., INC., ET AL.,
Appellees.

No. 16,470

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

versus

T. L. JAMES & CO., INC.,
Appellee.

BRIEF ON BEHALF OF MISSISSIPPI VALLEY BARGE LINE COMPANY IN SUPPORT OF ITS PETITION FOR REHEARINGS.

FOREWORD

May It Please the Court:

Mississippi Valley Barge Line Company and other river carriers subject to regulation by the Interstate Commerce Commission have for many years past been performing and still are performing the service of transport-

ing cargoes on board vessels supplied by the shipper under provisions of their tariffs on file with and promulgated by the Interstate Commerce Commission on the basis of common carriage and not towage. Your Honors' decision in these cases declaring these movements towage and not carriage will create a chaotic condition and will require the overhauling of the rate structures of these river carriers and the filing and promulgating of tariffs constructed on an entirely different theory than those presently in effect. Accordingly we earnestly invite Your Honors' reconsideration of these matters and suggest four grounds for reconsideration common to both cases and one additional ground with regard to Docket No. 16,470.

FIRST GROUND FOR REHEARINGS

We submit that the primary error into which Your Honors have fallen is in holding that this movement of a cargo of contractors' equipment on board the LA BELLE, supplied by the shipper, was towage and not common carriage.

In its tariff filed with and promulgated by the Interstate Commerce Commission, Mississippi Valley Barge Line Company published three sets of rates for the carriage of cargoes, in which, generally speaking, the differences are these:

Under the highest, or the so-called "A" rate, Valley provided the barge on which the cargo is laden and the towboat to move the barge, and waived certain exemptions from liability for loss of and damage to cargo granted by law to carriers of cargo by water, such as the benefit of Section 3 of the Harter Act, and assumed certain liabilities, such as the liability for flood damage. Still speaking generally, Valley's liability for loss of and

damage to cargo moved under an "A" rate closely approximated the liability of a common carrier by railroad.

Under the so-called "B" rate, which was substantially lower than the "A" rate, Valley undertook to carry cargoes in its own barges with towboats furnished by it, but, generally speaking, reserved to itself all of the exemptions and exoneration from and limitation of liability for loss of and damage to cargo which the law confers upon a common carrier by water.

Under a rate denominated as "C" rate, the lowest of these three rates, and substantially lower than the "A" and "B" rates, Valley undertook to carry cargoes loaded by the shipper on barges owned or supplied by the shipper. Valley furnished only the towboat, and the movement of the cargo was comparable to that afforded by a common carrier railroad which furnishes a locomotive and moves shipments in cars owned or supplied by the shipper.

All three of these rates are for the carriage of cargo, and, as the Supreme Court of the United States has held in *Sacramento Navigation Company v. Salz*, 273 U.S. 326, 47 S. Ct. 368, the movement of cargo on board a barge towed by a tug or towboat is carriage and not towage, notwithstanding the fact that the towing vessel performs towage service to the barge. However, in the cases at bar Your Honors have undertaken to differentiate the service performed by Mississippi Valley Barge Line Company from that performed in *Sacramento Navigation Company - Salz* on the ground that there the tug and the barge were commonly owned by the carrier, and here the barge LA BELLE was owned (or supplied) by the shipper.

We submit that this differentiation erroneously and unjustifiably makes the ownership of the barge rather

than the service performed the test of the character of the service, i.e., carriage where the barge and propelling vessel are commonly owned and towage where the barge and the towing vessel are not commonly owned. We submit that Your Honors' holding in that regard is contrary to the holding of the Court of Appeals for the Second Circuit in the well-considered case of *In Re O'Donnell* (2 C.C.A. 1928), 26 F. 2d 334, in which the Court rejected that test and also held that a partnership stricti juris between the owner of the tug and the barge to accomplish the transportation of the cargo is not necessary to constitute such transportation common carriage subject to Section 3 of the Harter Act.

Two District Courts have extended the doctrine of *Sacramento Navigation Company - Salz* as interpreted in *In Re O'Donnell*, supra, to situations where the tug and the cargo-carrying barge were not commonly owned and in which there is no question of joint venture or partnership between the respective owners of the tug and the barge. In *The Lehigh* (D.C. W.D. N.Y., 1935) 12 F. Supp. 75, the tug LEHIGH, with barges in tow in tandem formation, anchored in an improper position in a ship channel, as a result of which a vessel collided with one of the barges in tow. The colliding vessel was libelled by the barge owner and by the owner of cargo laden thereon, and the owner and claimant of the colliding vessel impleaded the tug and the barge whereon the cargo had been laden. The Court exonerated both the tug and the barge from liability for cargo damage, saying:

> "As above indicated, the Ballenas [the tug] and Loretta [the barge] were brought in by petition under Admiralty Rule 56, and it is the duty of the court to settle the entire controversy. Both the Ballenas and the Loretta were seaworthy,

(452)

> properly manned, equipped, and supplied at the beginning of the voyage, and the collision and sinking of the Loretta was due to errors in navigation and in the management of the tug and barge. The tug and tow constitute a single carrier within the meaning of section 3, c. 105, of the Act of February 13, 1893 (46 USCA § 192) and neither vessel can be held for loss of the cargo [*In re O'Donnell* (C.C.A.) 26 F. (2d) 334], and the suit of the Grasselli Chemical Company must be dismissed."

Agair, in *The Vale Royal* (D.C.D. Md., 1943), 51 F. Supp. 412, the Court reached the same result. There a barge laden with cargo was stranded by a tug of a different ownership than the barge, and both the barge owner and the owner of cargo laden on the barge libelled the tug for their respective damages. The Court held that the stranding had occurred through the mutual fault of the tug and the barge. It held the tug liable for half damages to the barge owner, but dismissed the claim of the cargo owner on the ground that the tug and the barge, though not commonly owned, constituted one vessel within the meaning and intendment of the Harter Act, saying:

> "Therefore, the only question remaining to be determined is whether the two vessels, the tug and the barge, constitute the 'vessel transporting merchandise or property' within Section 3 of the Harter Act, 46 U.S.C.A. § 192, that is to say, whether they are to be treated as one vessel. In *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 47 S. Ct. 368, 71 L. Ed. 663, the tug and the barge were so treated in a case where they both had the same owner. Similarly, in *In re O'Donnell*, 2 Cir., 26 F. 2d 334, the same result was reached where the tug and barges were owned by different persons but under an arrangement for sharing

profits. Libellants contend that unless the *Sacramento Navigation Company* case is extended beyond what they contend are the permitted limits of that decision, the Harter Act should not be held to apply to the present case and that, therefore, recovery should be allowed against the tug Trojan for the loss of the cargo. With this contention of libellants we do not agree. We do not understand that the Supreme Court in its decision in the *Sacramento Navigation Company* case intended to draw any sharp lines as respects ownership of the two vessels. It is true, as libellants contend, in that case certain language is employed with respect to *The Murrell*, 1 Cir., 195 F. 483, and *The Coastwise*, 1 Cir., 233 F. 1, which might, *prima facie*, tend to indicate the limitation in the *Sacramento Navigation Company* case for which libellants contend. With respect to these cases, the Supreme Court said, 273 U.S. at page 331, 47 S. Ct. at page 370, 71 L. Ed. 663: 'Some things are said ir those cases which, if we should not consider the differences between them and the present case, might justify this contention. The most important of these differences is that in both cases it was held that contracts of towage and not of affreightment were involved. We do not stop to inquire whether this conclusion as to the nature of the contracts was justified by the facts. It is enough that it was so held, and this holding was the basis of the decisions. Here, upon all the facts, as we have just said, the contract upon which respondent must rest is one of affreightment, the obligation of which is to carry a cargo, not to tow a vessel.'

"From this language, it is clear, first, that the Supreme Court intended to rest its distinction between the *Sacramento Navigation Company* case and these earlier decisions upon a definite difference understood to exist between the character of the contracts of carriage, namely, that the contract was one of affreightment in the *Sacramento*

Navigation Company case, and one of towage in the other cases. An examination of these earlier cases indicates that such was true. Charter party agreements, not bills of lading, were the subject of interpretation. Such, it is to be noted, is not true with respect to the cargo in the present case. We have only the bill of lading, a contract of affreightment. We are satisfied that the following very clear and succinct language of the court in the *Sacramento Navigation Company* case must be treated as controlling in the present instance unless we are prepared, as we are not, to rest our decision upon what we believe to be an unreasonably narrow distinction (273 U.S. at pages 328, 329, 47 S. Ct. at page 369, 71 L. Ed. 663): * * * [Here the Court quotes at length from the opinion in *Sacramento Navigation Company v. Salz*, which it would serve no useful purpose to reproduce here.]"

We submit further that this test wholly disregards the provisions of Section 314 of Part III of the Interstate Commerce Act (49 U.S.C., Section 914), which permits the owner of property transported to furnish an instrumentality to be used in connection with the carriage.[1]

Accordingly, we submit that Your Honors have erred primarily in holding the movement of cargo aboard

[1] The illogic of making the ownership of the cargo-carrying vehicle the test rather than the service performed appears when consideration is given to other types of transportation. Not only does Part III of the Interstate Commerce Act regulating water carriers permit shippers to furnish an instrumentality used by the carrier in the service, but similar provisions are found in Part I regulating rail carriers (49 U.S.C., Section 15), Part II regulating motor carriers (49 U.S.C., Section 324 (a)) and Part IV regulating freight forwarders (49 U.S.C., Section 1015). For years common carriers by railroad have been using refrigerator cars, tank cars and cars specially equipped for the transportation of acids supplied or procured by shippers, yet there has never been any suggestion that the lack of ownership of the cargo-carrying vehicle by the rail carriers makes the transportation of freight therein anything other than common carriage or the obligation of the carrier to such freight anything other than the obligation of a common carrier by rail.

the Barge LA BELLE to be towage and subject to the rules of towage with regard to liability for loss of and damage to cargo, and failing to hold the movement common carriage and subject to the rules of common carriage with regard to liability for loss of and damage to cargo.

SECOND GROUND FOR REHEARINGS

The second ground which we urge for rehearings is that Your Honors erred in holding that the shipper, T. L. James & Co., and the carrier, Mississippi Valley Barge Line Company, could contract for towage of the cargo of contractors' equipment, because no such movement of that cargo is provided for in the tariff filed by Mississippi Valley Barge Line Company with the Interstate Commerce Commission and promulgated by it.

It is well settled in law that a regulated carrier cannot perform for a shipper, and that a shipper cannot require a regulated carrier to perform, a service not provided for in the regulated carrier's tariff on file with and promulgated by the Interstate Commerce Commission. In *Texas & P. R. Co. v. American Tie & Timber Co., Ltd.*, 234 U.S. 138, 34 S. Ct. 885, a shipper sought damages from a common carrier by railroad for refusal to carry cross-ties, because of a lack of an applicable tariff. Affirming the correctness of the carrier's position the Supreme Court said:

> "There is no room for controversy that the law required a tariff, and therefore, if there was no tariff on cross-ties, the making and filing of such tariff conformably to the statute was essential. And it is equally clear that the controversy as to whether the lumber tariff included cross-ties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred

upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that, for the preservation of the uniformity which it was the purpose of the act to regulate commerce to secure, the co. rts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Commission."

Again, in *Lowden, et al. v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 59 S. Ct. 612, a shipper protested against a provision in a tariff filed with the Interstate Commerce Commission which provided that the railroad would act as a shipper's agent and install grain doors on freight cars at a charge of $1.00 per car, and, in a letter requesting the installation of the doors, notified the carrier that it would not be bound by the tariff provision that it should pay the charge. The carrier installed the doors and brought suit for charges assessed in accordance with the tariff. Before trial in the District Court, the Interstate Commerce Commission reviewed the tariff and reduced the tariff charge from $1.00 per car to $ .60 per car. Holding the shipper liable for the charge on the basis of the reduced rate, the Court said:

"The announcement that respondent would decline to pay for them in no way qualified the request for tariff services, and cannot now stave off liability. The petitioners could disregard this advance disclaimer of liability and rely upon the courts to enforce observance of the tariff. Until changed, tariffs bind both carriers and shippers with the force of law. Under Section 6 of the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property."

Furthermore, ignorance of the shipper of the provi-

sions of the carrier's tariff, or the failure of the carrier to quote to the shipper the pertinent provisions of the tariff is no excuse which permits either to depart from the strict terms of the tariff, for to do so would be for the carrier to grant a discrimination and the shipper to accept one, both reprobated by law. In this connection we cite *Atchison, Topeka & Santa Fe Railway Company v. C. E. Robinson*, 233 U.S. 173, 34 S. Ct. 556; *Southern Railway Company v. W. E. Prescott*, 240 U.S. 632, 36 S. Ct. 469; *Pittsburgh, C. C. & St. L. Ry. Co. v. Fink*, 250 U.S. 577, 40 S. Ct. 27; *New York Cent. & H. R.R. Co. v. York & Whitney Co.*, 256 U.S. 406, 41 S. Ct. 509; *Chesapeake & O. Ry. Co. v. Martin, et al.*, 283 U.S. 209, 51 S. Ct. 453; *Lowden, et al. v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 59 S. Ct. 612; *Strawberry Growers' Selling Co., Inc. v. American Ry. Express Co.* (5 C.C.A.) 31 F. 2d 947; *Socony-Vacuum Oil Co. v. Smith* (C.A. 5, 1950), 179 F. 2d 672, 675, 1950 A.M.C. 445; *Union Pac. R. Co. v. Gaede* (C.A. 10, 1940), 110 F. 2d 931, 933; *West India Oil Co. v. Compania Transatlantica de Barcelona* (C.C.A. 2, 1924) 5 F. 2d 425, 430, 1925 A.M.C. 150; *Martug Towing Co. v. Eastern Transp. Co.* (C.A. 3, 1945) 152 F. 2d 924, 929, 1946 A.M.C. 251.[2]

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[2] Your Honors appear to have been influenced to some extent by the fact that the bill of lading for this shipment of contractors' equipment was not issued until after the barge had sunk. We submit that that is wholly immaterial and that it would have been immaterial if the bill of lading had never been issued. Notwithstanding the fact that a bill of lading is not actually issued, both the carrier and the shipper are bound by the terms of the bill of lading prescribed for the shipment by the Interstate Commerce Commission; in this case the bill of lading in the form provided in Mississippi Valley Barge Line Company's Freight Tariff 25-C, I.C.C. 101. 13 C.J.S., Carriers, § 123b, pp. 237-238; *New York Cent. R. Co. v. Lazar* (C.C.A. 2, 1922) 278 F. 900; *Charles J. Webb Sons Co. v. Central R. Co. of N. J.* (D.C. S.D. N.Y., 1928) 28 F. 2d 392; *Atlantic Coast Line R. Co. v. Clinchfield Fuel Co.* (D.C. W.D. S.C., 1951) 94 F. Supp. 992; *New England Fruit & Produce Co. v. Hines*, 97 Conn. 225, 116 A. 243; *Western Maryland Ry. Co. v. Cross*, 96 W. Va. 666, 123 S.E. 572; *Chesapeake & O. Ry. Co. v. Glogora Coal Co.*, 113 W. Va. 796, 169 S.E. 471, certiorari denied, 290 U.S. 658, 54 S. Ct. 73.

Mississippi Valley Barge Line Company's Freight Tariff 25-C, I.C.C. 101, which was on file with and had been promulgated by the Interstate Commerce Commission effective June 15, 1954, and in effect at the time that this shipment moved, governed the transportation of the cargo of contractors' equipment, and Mississippi Valley Barge Line Company, a regulated carrier, could not contract with the shipper, T. L. James & Co., for the movement of the cargo of contractors' equipment on any basis other than that provided by the tariff; otherwise there would result a discrimination granted by Mississippi Valley Barge Line Company and accepted by T. L. James & Co.

Mississippi Valley Barge Line Company's Freight Tariff 25-C, I.C.C. 101,[3] is subscribed on the front cover as Valley's freight tariff "naming local and joint all water commodity rates in bargeloads and rates for transporting empty barges". Nowhere in that tariff is any rate quoted for moving any loaded barge—only empty barges. The only rate named in the tariff which could be pertinent to this movement is Valley's "C" rate, which is for the carriage of the cargo of contractors' equipment on board a barge supplied by the shipper.

Accordingly, we submit that Your Honors have erred in holding that Mississippi Valley Barge Line Company and T. L. James & Company did—or could—contract for the towage of this equipment.

THIRD GROUND FOR REHEARINGS

As the third ground for rehearings we submit that Your Honors erred in assuming jurisdiction to declare

[3] Exhibit Valley 7, sent up to this Court in the original.

invalid the liability clauses embodied in Valley's tariff filed with and promulgated by the Interstate Commerce Commission, and in support thereof we cite the recent decision of the Supreme Court of the United States in *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 77 S. Ct. 161. As the Court there quite pertinently remarked:

> "A tariff is not an abstraction. It embodies an analysis of the costs incurred in the transportation of a certain article and a decision as to how much should, therefore, be charged for the carriage of that article in order to produce a fair and reasonable return. Complex and technical cost-allocation and accounting problems must be solved in setting the tariff initially."

Here Valley has published three rates—an "A" rate, a "B" rate and a "C" rate. Each of these rates embodies an analysis of the costs incurred in the transportation of the article, the cost of furnishing equipment, the cost of the carrier's providing insurance to cover loss of and damage to cargo, all of which must be determined to produce for the carrier a fair and reasonable return for the transportation of the cargo.

The liability assumed by the carrier for loss of and damage to cargo is one of the principal items which entered into each of these three rates: under the highest, or "A" rate, the carrier assumes the greatest liability; under the "B" rate, a lesser liability; and under the "C" rate, which is the lowest rate, no liability. Obviously that rate does not contain anything for cargo insurance taken out by the carrier.

We submit that Your Honors should not undertake to pass on the validity of the liability features of the

tariff and that if any question of the validity of those rates is involved, that is a matter which should be referred to the Interstate Commerce Commission.

Accordingly, we submit that Your Honors have erred in assuming jurisdiction to declare invalid the provisions of Mississippi Valley Barge Line Company's tariff filed with and promulgated by the Interstate Commerce Commission.

FOURTH GROUND FOR REHEARINGS

The fourth ground urged for rehearings is really a corollary of the third. If Your Honors assume jurisdiction to pass on the validity of the liability provisions in Mississippi Valley Barge Line Company's tariff, then it is submitted that you should hold it valid.

Your Honors assume the invalidity of these exculpatory clauses with regard to liability, citing the *Bisso Case*.[4] We submit that the *Bisso Case* does not justify such a conclusion and that to assume the invalidity of these exculpatory clauses by reason of the *Bisso Case* is a wholly unwarranted extension of the doctrine of that case.

The *Bisso Case* lacked four of the essential ingredients found in this case. First, in the *Bisso Case* the movement was admittedly towage and not carriage. Second, Bisso was a private tower and not one subject to the jurisdiction of the Interstate Commerce Commission. Third, the agreement between Bisso and the shipper was a private contract of towage and not one made pursuant to a tariff on file with and promulgated by the Inter-

[4] *Bisso v. Inland Waterways Corp.*, 349 U.S. 85.

state Commerce Commission. Fourth—and though last, certainly not least, for it is an important ingredient—in the *Bisso Case* the owner of the craft towed was not afforded a choice of rates, such as in this case.

As Mr. M. C. Pearson, Mississippi Valley Barge Line Company's Traffic Manager, who published Valley's Freight Tariff 25-C, I.C.C. 101 [5] testified,[6] in making Valley's rates he takes into consideration the costs, which includes all expenses plus a fair profit and the cost of insurance where Valley has any liability for loss of or damage to cargo. The pertinent portion of his testimony was given in answer to the question whether the question of insurance or liability enters into the rate structure. He replied:

> "Yes, it does, as will be observed from the Exhibit-8, I believe it was. There is a difference between the A, B, and C rates. The B rates are lower than the A rates because of the difference in liability assumed by this company, which takes into consideration that the shipper-customer must purchase insurance if he wants it insured. Likewise, the "C" rates which apply in customers' barges, takes into consideration that the customer supplies the barge in which we transport the freight, and, of course, also furnishes his own insurance."

There is no contrary testimony, yet Your Honors' decision in these cases produces the incongruous result that for the lowest of the three rates the shipper has been afforded the protection against loss of or damage to cargo provided only by the highest of the three rates, the "A" rate, because by its express terms the intermediate,

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[5] R. 167.
[6] R. 172.

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or "B", rate, which is indisputably a carriage rate, affords carriage subject to the provisions of Section 3 of the Harter Act. Likewise, Your Honors' decision in these cases produces the incongruous result that the carrier finds itself saddled with a liability which it assumed only under an "A" rate—its highest rate, and a liability which it has not insured because its rate did not include anything with which to purchase insurance.

We therefore submit that if Your Honors assume jurisdiction to consider the validity of the liability clauses in Valley's tariff, you should hold those provisions valid and enforceable.

FIFTH GROUND FOR REHEARING, APPLICABLE ONLY TO DOCKET NO. 16,470

If rehearings be granted on any one or more of the above four grounds which are common to both cases, then we submit that Valley should have a decree in Docket No. 16,470 for the amount of its carriage charges and the Federal transportation tax thereon,[7] or that case should be remanded to the District Court with instructions to determine that point.

CONCLUSION

We therefore respectfully submit that Your Honors' opinion handed down on May 3, 1957, and the decrees resulting therefrom are erroneous on the grounds stated in the petition for rehearings; and that Your Honors

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[7] *Pittsburgh, C. C. & St. L. Ry. Co. v. Fink*, 250 U.S. 577, 40 S. Ct. 27; *Strawberry Growers' Selling Co., Inc. v. American Ry. Express Co.* (5 C.C.A.), 31 F. 2d 947; *Allanwilde Transport Corporation v. Vacuum Oil Co.*, 248 U.S. 377, 39 S. Ct. 147; *The Laurent Meeus* (9th C.C.A. 1942), 133 F. 2d 552, certiorari denied 63 S. Ct. 858; *The Quarrington Court* (2nd C.C.A. 1941), 122 F. 2d 266; *Globe & Rutgers Fire Ins. Co. v. U. S.*, 105 F. 2d 160.

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should grant rehearings in these two cases and should reverse the decrees rendered by the United States District Court therein.

Respectfully submitted,
(s) SELIM B. LEMLE
SELIM B. LEMLE,
Attorney for Petitioner,
Mississippi Valley Barge
Line Company, Appellant.

LEMLE & KELLEHER,
Of Counsel.

CERTIFICATE

I certify that a copy of the within petition for rehearings and the brief in support thereof has been served on the attorney for the appellee herein by depositing a copy thereof in the United States Mail, postage prepaid, addressed to him at his office in the City of New Orleans.

New Orleans, Louisiana, May 23, 1957.

/s/ SELIM B. LEMLE

ORDER DENYING REHEARING.

Extract from the Minutes of June 25, 1957.

MISSISSIPPI VALLEY BARGE LINE COMPANY,

No. 16469 versus

T. L. JAMES & CO., INC., ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

* * * *

APPLICATION OF APPELLANT FOR STAY OF MANDATE

Filed: June 27, 1957

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 16,469

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

versus

T. L. JAMES & CO., INC., ET AL.,
Appellees.

Suggesting to the Court that it is the bona fide intention of Mississippi Valley Barge Line Company to make application to the Supreme Court of the United States for a writ of certiorari in this case within the time allowed by law; that valid grounds for issuance of such a writ are present herein; and that Mississippi Valley Barge Line Company will require a stay of the mandate of this Court pending preparation and filing of such application:

Mississippi Valley Barge Line Company, through its undersigned proctor of record, moves the Court to enter an order withholding its mandate herein for a period of ninety (90) days, to enable Mississippi Valley Barge Line Company to apply for a writ of certiorari from the Supreme Court of the United States.

New Orleans, Louisiana, June 27, 1957.

(s) SELIM B. LEMLE
Selim B. Lemle,
Proctor for Mississippi
Valley Barge Line Company.

ORDER STAYING MANDATE

Filed: July 2, 1957.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

versus No. 16469

T. L. JAMES & CO., INC., ET AL.,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of sixty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within sixty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of sixty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 1st day of July, 1957.

(s) J. C. HUTCHESON, JR.
United States Circuit Judge.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA.
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 388 to 424, next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 16469, wherein Mississippi Valley Barge Line Company, is appellant and T. L. James & Co., Inc., et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the mimeographed record, Volumes I and II, numbered from 1 to 387 are identical with the mimeographed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit this 3rd day of July, A. D., 1957.

(Signed) EDWARD W. WADSWORTH
Clerk, United States Court of
Appeals for the Fifth Circuit.

(SEAL)

FILED
SEP 9 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 446

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Petitioner,

versus

T. L. JAMES & CO., INC., ET AL.,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Section 225 of Part II of the Interstate Commerce Act, being 49 U.S.C. 324(a), Act of February 4, 1887, c. 104, Part II, § 225, as added September 18, 1940, c. 722, Title I, § 26(a), 54 Stat. 928. 60

Section 302(e) of Part III of the Interstate Commerce Act, being 49, U.S.C. 902, Act of February 4, 1887, c. 104, Part III, § 302, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 929. 61

Section 305 of Part III of the Interstate Commerce Act, being 49 U.S.C. 905(b), Act of February 4, 1887, c. 104, Part III, § 305, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 934. 62

Sections 306(a) and 306(c) of Part III of the Interstate Commerce Act, being 49 U.S.C. 906, Act of February 4, 1887, c. 104, Part III, § 306, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 935. 63

Section 314 of Part III of the Interstate Commerce Act, being 49 U.S.C. 914, Act of February 4, 1887, c. 104, Part III, Section 314, as added September 18, 1940, c. 722, Title II, Section 201, 54 Stat. 945. 64

Section 415 of Part IV of the Interstate Commerce Act, being 49 U.S.C. 1015, Act of February 4, 1887, c. 104, Part IV, § 415, as added May 16, 1942, c. 318, § 1, 56 Stat. 296. 65

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Section 11(a) of Mississippi Valley Barge Line Company's bill of lading. 53

Supreme Court of the United States

OCTOBER TERM, 1957.

No.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Petitioner,

versus

T. L. JAMES & CO., INC., ET AL.,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Mississippi Valley Barge Line Company (hereinafter referred to simply as "Valley") prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit, one affirming an interlocutory decree in admiralty and the other a final decree in a Civil Action at law, rendered by the United States District Court for the Eastern District of Louisiana, in two closely related cases.

OPINIONS BELOW

The opinion of the Court of Appeals which disposed of both cases is reported at 244 F. 2d 263 and is printed *infra* Appendix p. 29 *ff.* The opinion of the District Court, which likewise disposed of both cases, is reported

at 144 F. Supp. 662 and is printed *infra* Appendix p. 38 *ff.*[1].

JURISDICTION

The judgments of the Court of Appeals for the Fifth Circuit were entered on May 3, 1957,[2] and copies thereof are printed *infra* Appendix respectively pp. 49 and 50. Thereafter petitioner presented to the Court of Appeals petition for rehearings which were denied without further opinion on June 25, 1957.

Jurisdiction of this Court is invoked in both cases under 28 U.S.C. 1254, Act of June 25, 1948, c. 646, 62 Stat. 928.

Jurisdiction of the United States District Court for the Eastern District of Louisiana in the Admiralty Action lay under 28 U.S.C. 1333(1), Act of June 25, 1948, c. 646, 62 Stat. 931, amended May 24, 1949, c. 139, § 79, 63 Stat. 101. Jurisdiction of the United States District Court for the Eastern District of Louisiana in the Civil Action lay under 28 U.S.C. 1331, Act of June 25, 1948, c. 646, 62 Stat. 930.

THE QUESTIONS PRESENTED FOR REVIEW

This petition presents only the following questions of law:

I.

An interstate common carrier by water is so certificated by the Interstate Commerce Commission under

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[1] *The Record* here consists of a two volume record in the Admiralty Action which is complete in all respects and includes the testimony taken in the District Court in both the Admiralty Case and Civil Action which were tried there together; also of a one volume record in the Civil Action complete except for the testimony taken in the District Court. All references herein to the Record are to the paging of the two volume Record in the Admiralty Action.

[2] R. 389.

and is subject to the regulation of Part III of the Interstate Commerce Act for the transportation of shipments on non-self-propelled barges with the use of towboats. This carrier files with the Commission a tariff in which it publishes three rates for such transportation: under the two highest rates it furnishes the towboat and the barge and under the lowest rate it furnishes the towboat and the shipper furnishes the barge. Where the shipper chooses the lowest rate and furnishes the barge and loads the cargo therein, and the carrier furnishes the towboat and performs the transportation, is the transportation of this cargo towage (as held by the Court of Appeals in the cases at bar) or is such transportation affreightment, as held by Your Honors in *Sacramento Navigation Company v. Salz*, 273 U.S. 326, 47 S. Ct. 368, so that the carrier is entitled to the benefit of Section 3 of the Harter Act?[3]

II.

The tariff filed by the carrier with the Interstate Commerce Commission (as hereinabove stated under I) contains certain clauses fixing the liability of the carrier, dependent on the rate charged for the transportation. Do the courts have jurisdiction to declare such provisions invalid (as the Court of Appeals has undertaken to do in the cases at bar) or is such jurisdiction vested in the first instance in the Interstate Commerce Commission as Your Honors held in *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 77 S. Ct. 161?

STATUTES INVOLVED

Section 3 of the Harter Act, 46 U.S.C. 192, being Act of February 13, 1893, c. 105, § 3, 27 Stat. 445;

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[3] 46 U.S.C. 192, reproduced in Appendix, *infra* p. 54.

Section 4 of the Harter Act, being 46 U.S.C. 193, Act of February 13, 1893, c. 105, § 4, 27 Stat. 445;

The Interstate Commerce Act, and particularly

National Transportation Policy, September 18, 1940, being 49 U.S.C., preceding Sections 1, 301, 901, and 1001;

Section 1 of Part I of the Interstate Commerce Act, being 49 U.S.C. 1(4), Act of June 18, 1910, § 7, c. 309, 36 Stat. 545, as amended February 28, 1920, c. 91, § 400, 41 Stat. 474; September 18, 1940, c. 722, Title I, § 2(c), 54 Stat. 899;

Section 15 of Part I of the Interstate Commerce Act, being 49 U.S.C., Section 15(13), Act of February 4, 1887, c. 104, Section 15, 24 Stat. 384, as added June 29, 1906, c. 3591, § 4, 34 Stat. 590; as amended June 18, 1910, c. 309, § 12, 36 Stat. 553-554; February 28, 1920, c. 91, § 421, 41 Stat. 488; March 4, 1927, c. 510, § 2, 44 Stat. 1447; August 9, 1935, c. 498, § 1, 49 Stat. 543; September 18, 1940, c. 722, Title I, Section 10(a-d), 54 Stat. 911, 912;

Section 20(11) of Part I of the Interstate Commerce Act, being 49 U.S.C. 20 (11), Act of February 4, 1887, c. 104, Pt. I, § 20, 24 Stat. 386; June 29, 1906, c. 3591, § 7, 34 Stat. 593; Mar. 4, 1915, c. 176, § 1; 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441; Feb. 28, 1920, c. 91, §§ 436-438, 41 Stat. 494; July 3, 1926, c. 761, 44 Stat. 835; Mar. 4, 1927, c. 510, § 3, 44 Stat. 1448; Apr. 23, 1930, c. 208, 46 Stat. 251; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 13(b), 54 Stat. 919;

Section 216 of Part II of the Interstate Commerce Act, being 49 U.S.C. 316(c), Act of February 4, 1887, c. 104, Part II, § 216, as added August 9, 1935, c. 498, 49 Stat. 558, and amended June 29, 1938, c. 811, § 16, 52 Stat. 1240; September 18, 1940, c. 722, Title I, § 22(b-d), 54 Stat. 924;

Section 225 of Part II of the Interstate Commerce Act, being 49 U.S.C., § 324(a), Act of February 4, 1887, c. 104, Part II, § 225, as added September 18, 1940, c. 722, Title I, § 26(a), 54 Stat. 928;

Section 302(e) of Part III of the Interstate Commerce Act, being 49 U.S.C., Section 902, Act of February 4, 1887, c. 104, Part III, § 302, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 929;

Section 305 of Part III of the Interstate Commerce Act, being 49 U.S.C. 905(b), Act of February 4, 1887, c. 104, Part III, § 305, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 934;

Sections 306(a) and 306(c) of Part III of the Interstate Commerce Act, being 49 U.S.C. Section 906, Act of February 4, 1887, c. 104, Part III, § 306, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat 935;

Section 314 of Part III of the Interstate Commerce Act, being 49 U.S.C. 914, Act of February 4, 1887, c. 104, Part III, Section 314, as added September 18, 1940, c. 722, Title II, Section 201, 54 Stat. 945;

Section 415 of Part IV of the Interstate Commerce Act, being 49 U.S.C., Section 1015, Act of February 4, 1887, c. 104, Part IV, § 415, as added May 16, 1942, c. 318, § 1, 56 Stat. 296.

STATEMENT

Valley is a common carrier by water and so certificated by the Interstate Commerce Commission. The pertinent provisions of this certificate[4] authorize Valley, as a common carrier in interstate commerce, to transport cargoes by non-self-propelled vessels with the use of separate towing vessels and to engage in general towage between certain points, "subject, however, to such terms, conditions, and limitations as are now, or hereafter may be attached to the exercise of such authority from this Commission". Its certificate is conditioned "upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules and regulations of the Commission thereunder".

Valley filed its tariff with the Interstate Commerce Commission and this tariff was in full force and effect at all times pertinent hereto. In this tariff[5] Valley published rules, regulations and rates for the towage of empty barges only, but published no rules, regulations or rates for the towage of barges with cargo thereon. In the same tariff Valley published rules, regulations and rates for the transportation of cargoes, the movement of which was regulated under Part III of the Interstate Commerce Act. For this transportation Valley published three sets of rates in which, generally speaking, the differences are these:

Under the highest rate, denominated as "A" rate, Valley provided the barge on which the cargo is laden and the towboat to move the barge, and waived certain exemptions from liability for loss of and damage to cargo

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[4] Reproduced verbatim in the Appendix *infra* p. 53.

[5] Mississippi Valley Barge Line Company Freight Tariff 25-C, I.C.C. 101, Exhibit Valley 7, sent to this Court in the original and pertinent provisions printed in Appendix, *infra* p. 65 *ff.*

granted by law to carriers of cargo by water, such as the benefit of Section 3 of the Harter Act, and assumed certain liabilities, such as the liability for flood damage. Speaking generally, Valley's liability for loss of and damage to cargo moved under an "A" rate closely approximated the liability of a common carrier by railroad.

Under a rate denominated as "B" rate, which was substantially lower than the "A" rate, Valley undertook to carry cargoes in its own barges with towboats furnished by it, but, generally speaking, reserved to itself all of the exemptions and exoneration from and limitation of liability for loss of and damage to cargo which the law confers upon a common carrier by water.

Under a rate denominated as "C" rate, the lowest of these three rates, and substantially lower than the "A" and "B" rates, Valley undertook to carry cargoes loaded by the shipper on barges owned or supplied by the shipper. Valley furnished only the towboat, and the movement of the cargo was comparable to that afforded by a common carrier railroad which furnishes a locomotive and moves shipments in cars owned or supplied by the shipper. For the transportation of cargoes on barges supplied by the shipper, only the "C" rate applied.

T. L. James & Co., Inc., a general contractor, (hereinafter referred to as "James") requested Valley's Houston, Texas office to quote a rate for the transportation of a cargo of contractors' equipment, including some drag lines and a bulldozer, to be loaded on a barge supplied by James, from New Orleans, Louisiana, to Cheatham Dam, Tennessee, thence to return the barge light to New Orleans. This was a route over which Valley was certificated to operate and an affreightment movement cov-

ered by its Interstate Commerce Commission tariff at the "C" rate therein provided, but Valley's tariff did not provide for such a movement as a towage movement. Thereafter Valley quoted James the "C" rate for this movement, being, as stated, the only rate provided by Valley's tariff.

This rate was accepted by James' representative. James supplied the Barge LA BELLE[6] and loaded thereon the cargo of contractors' equipment at Krotz Springs, Louisiana, on the Atchafalaya River, off-line for Valley, as it is not certificated to operate there. The LA BELLE was transported to New Orleans by a carrier procured by James, and was at New Orleans delivered to Valley, which incorporated the LA BELLE in a northbound tow and departed New Orleans bound for Cheatham Dam, Tennessee. En route the Barge LA BELLE careened, dumped its cargo and then sank in the Mississippi River. Both barge and cargo were recovered.

For the cargo of contractors' equipment, Valley issued its bill of lading in the form prescribed by its Interstate Commerce Commission tariff, but because the estimated weight of that cargo had not been received by Valley prior to the departure of the barge, the bill of lading was not issued until after the barge had sunk. The bill of lading was sent to the shipper, James, which retained it.

Payment of Valley's carrier charges computed in accordance with its I.C.C. tariff was declined by the shipper and Valley brought a Civil Action at law in the United States District Court for the Eastern District of Louisiana, New Orleans Division, against T. L. James & Co.,

[6] Owned by third party and under bareboat charter to James.

Inc. for these carrier charges and the federal transportation tax thereon. Subsequently, T. L. James & Co., Inc. and Brown & Root, Inc., also in the contracting business, alleging the two companies together were engaged in business in a joint venture under the name of Louisiana Bridge Company and were the owners of the cargo laden on the LA BELLE, brought an Admiralty Action in the United States District Court for the Eastern District of Louisiana, New Orleans Division, against Valley for damage to the cargo of contractors' equipment. In the same Admiralty Action James claimed damages for the sinking and for the damage sustained by the Barge LA BELLE, claiming that it was the bareboat charterer and bailee thereof.[7]

Trying the Civil Action and the Admiralty Action together, the District Court held that the movement of the contractor's equipment on the LA BELLE was towage and not affreightment so that Section 3 of the Harter Act was not applicable; and that Valley had been guilty of negligent towage and was, therefore, liable for the damage both to the Barge LA BELLE and to the cargo of contractors' equipment thereon. The District Court held alternatively that if the movement be affreightment, both the shipper's barge and the contractors' equipment laden thereon constituted "cargo"[8] so that a

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[7] Valley filed a cross-libel against James for reimbursement of any amount for which it might be held liable if the Court found the LA BELLE unseaworthy when delivered to Valley, alleging that that would constitute a breach of the warranty assumed by James under the provisions of Valley's tariff, but because the District Court found the LA BELLE "in all respects trim and apparently seaworthy" (R. 367, see Appendix *infra* p. 40) when delivered to Valley and no contrary finding was made by the Court of Appeals, we accept this finding of seaworthiness and make no further mention of this point.

[8] This disregards the fact that the bill of lading issued by Valley was for the contractors' equipment only, and that the barge, being the vehicle on which the cargo was laden, did not constitute "cargo". See *The Lehigh* (D.C.W.D. N.Y., 1935), 12 F. Supp. 75; *The Vale Royal* (D.C. D.Md., 1943), 51 F. Supp. 412, hereinafter discussed, pp. 18-19.

failure to sound bilges and to keep the barge pumped out was improper care and custody of "cargo", and Valley was liable as a carrier for failure in care and custody of the cargo. With regard to the Civil Action the District Court held further that to allow Valley to recover its transportation charges and the federal transportation tax thereon in the Civil Action would simply increase correspondingly James' damages, so the Court would not determine whether or not Valley was entitled to recover the transportation charges and the tax. In the Admiralty Action the District Court entered an interlocutory decree[9] of liability with a provision for determining libellant's damages, and in the Civil Action the District Court entered a final decree[10] dismissing the complaint. From both the interlocutory and final decrees Valley appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed, on the sole ground "that the movement was one of towage"[11] so that it refrained from expressing a definite opinion on the alternative ground found by the District Judge that Valley was not entitled to exoneration under Section 3 of the Harter Act because the barge as well as the cargo laden thereon constituted cargo.

REASONS FOR GRANTING THE WRITS

Your Honors should grant writs of certiorari in these cases for two reasons: (I) To settle the application *vel non* of *Sacramento Navigation Company v. Salz* to the transportation by Interstate Commerce Commission certificated common carriers of cargoes on non-self-propelled barges not owned by the carriers with the use of tow-

[9] R. 378.

[10] Record in the Civil Action p. 19.

[11] R. 400.

boats owned and operated by the carriers, and the application of Section 3 of the Harter Act to such transportation. We submit that the judgment of the Court of Appeals for the Fifth Circuit holding in the cases at bar that such transportation of cargo is towage is both incorrect and in conflict with the jurisprudence in the Second Circuit *In Re O'Donnell* (2 C.C.A., 1928) 26 F. 2d 334, and *The Lehigh* (D.C. W.D. N.Y., 1935) 12 F. Supp. 75, and in the Fourth Circuit in *The Vale Royal* (D.C.D. Md., 1943) 51 F. Supp. 412, holding that such transportation is affreightment and specifically rejecting as the determining test of affreightment or towage the common ownership of the towboat and the barge whereon the cargo is laden. (II) To settle the question whether the courts have the jurisdiction which they have assumed in the cases at bar to declare invalid provisions of an Interstate Commerce Commission tariff fixing the liability of the carriers for loss of and damage to cargoes depending upon the shipper's choice of different transportation rates. This, we submit, conflicts with the rule pronounced by Your Honors in *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 77 S. Ct. 161, that such jurisdiction lies solely in the Interstate Commerce Commission.

I.

We submit that in holding that the transportation of the cargo of contractors' equipment on the Barge LA BELLE constituted towage, grievous error has been committed. Not only is this holding erroneous, but the result thereof has been to unsettle the entire inland water carrier industry in the Mississippi Valley and the Gulf Intracoastal Waterway, which almost uniformly over a period of years has been and still is transporting cargoes

regulated by Part III of the Interstate Commerce Act on barges not owned by the carriers with the use of towing vessels owned or operated by the carriers, on the theory that such transportation constitutes affreightment. This has been done in reliance on the provisions of Section 314 of Part III of the Interstate Commerce Act[12] which permit a shipper to furnish instrumentalities used in the transportation of cargo. In *Sacramento Navigation Company v. Salz, supra,*[13] and in decisions of an Appellate Court of the United States and the District Courts of the United States hereinafter referred to such cargo movements were characterized as affreightment and the carrier afforded the benefit of Section 3 of the Harter Act. This, we submit, is the correct and proper characterization of such cargo movements.

What is it that the shipper sought to accomplish here? The shipper sought to accomplish the transportation of a cargo of contractors' equipment from New Orleans to Cheatham Dam, Tennessee, because it proposed using that equipment on a job there. Incidental to such transportation it was, of course, necessary to move the Barge LA BELLE, loaded, from New Orleans to Cheatham Dam and after its discharge there, to return the empty barge to New Orleans, but that was only incidental. The Barge LA BELLE was already at New Orleans and the round-trip of the barge from New Orleans to Cheatham Dam and return would have been purposeless, except for the need of transporting the cargo from New Orleans to Cheatham Dam.

In *Sacramento Navigation Company v. Salz, supra,* Your Honors held that the movement of cargo on a barge

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[12] 49 U.S.C. 914, reproduced in the Appendix *infra* p. 64.
[13] 273 U.S. 326, 47 S. Ct. 368.

towed by a tug or towboat is affreightment and not towage, notwithstanding the fact that the towing vessel performs towage service to the barge, saying that while towage service is the employment of one vessel to expedite the voyage of another, there, as here, the contract actually made with the shipper "was not to tow a vessel, but to transport goods and plainly that contract was a contract of affreightment".[14] However, in *Sacramento Navigation Company v. Salz* the towing vessel and the barge whereon the cargo was laden wer commonly owned, and that, says the Court of Appeals, differentiates that case from the cases at bar, for here the towboat was owned by Valley and the barge was supplied by James and not owned by Valley. The movement of a barge not owned by the carrier, with or without cargo laden thereon and regardless of the purpose for which the movement be performed, says the Court of Appeals, constitutes towage. That is the real basis of the Court of Appeals' holding in this case: the movement of both the Barge LA BELLE and the cargo laden thereon constituted towage and not affreightment. We submit that this is a wholly incorrect differentiation, for the reason that it adopts as the test of towage as distinguished from affreightment of cargo the ownership of the barge whereon the cargo is laden rather than the character or purpose of the service performed by the carrier. We submit that the only logical and correct test is the purpose of the service performed by the carrier, regardless of the ownership of the barge whereon the cargo is laden.

The illogical test adopted by the Court of Appeals that the ownership of the barge determines whether the movement by the carrier is affreightment or towage, is

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[14] For your Honors' ready reference, the pertinent portion of the opinion in *Sacramento Navigation Company v. Salz* is reproduced in the Appendix *infra* p. 51 *ff.*

certainly not contemplated by Part III of the Interstate Commerce Act; in fact that Act in Section 314 of Part III[15] distinctly provides that a shipper may furnish an instrumentality which, of course, includes a barge, to be used by the carrier in performing the carriage or affreightment.[16] In this connection the illogic of making the ownership of the cargo-carrying vehicle the test rather than the service performed by the carrier appears when consideration is given to other types of transportation. Not only does Part III of the Interstate Commerce Act regulating water carriers permit shippers to furnish an instrumentality used by the carrier in the service, but similar provisions are found in Part I regulating rail carriers,[17] Part II regulating motor carriers[18] and Part IV regulating freight forwarders.[19] For years common carriers by railroad have been using refrigerator cars, tank cars and cars specially equipped for the transportation of acids supplied or procured by shippers, yet there has never been any suggestion that the lack of ownership of the cargo-carrying vehicle by the rail carriers makes the transportation of freight therein anything other than common carriage affreightment or the obligation of the carrier to such freight anything other than the obligation of a common carrier by rail.

Accordingly, what is it about water transportation which converts a movement which would be affreight-

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[15] 49 U.S.C. 914, reproduced in the Appendix *infra* p. 64.

[16] The requirement of Section 314 that charges and allowances for the use of a shipper's instrumentality must be fixed by the Interstate Commerce Commission, in this case is supplied by the differential between the low "C" Rate applicable where the shipper furnishes the barge and the higher "A" and "B" Rates where the carrier furnishes the barge.

[17] 49 U.S.C., Section 15(13), reproduced in the Appendix *infra* p. 57.

[18] 49 U.S.C., Section 324(a), reproduced in the Appendix *infra* p. 60.

[19] 49 U.S.C., Section 1015, reproduced in the Appendix *infra* p. 65.

ment when performed by any other type of carrier, into towage when it is performed by a carrier by water? The National Transportation Policy, as declared by Congress, includes a declaration that it is the policy to the greatest extent possible of equalizing all modes of transportation—water, rail and motor carrier.[20]

Part I of the Interstate Commerce Act requires common carrier railroads subject thereto to establish reasonable through rates with common carriers by water subject to Part III and just and reasonable rates, fares, charges and classifications applicable thereto.[21] Part II of the Interstate Commerce Act makes a similar requirement as to motor carriers subject thereto,[22] and Part III of the Interstate Commerce Act makes a similar requirement with regard to water carriers with relation to both rail and motor carriers.[23] What effect will this artificial distinction of the Court of Appeals have on such joint through movements? Take a typical example: a shipment of grain delivered to Union Pacific Railroad at some inland point in the midwest for through movement by rail and water to Galveston, Texas, for export. The shipment is delivered to the rail carrier at the inland shipping point and a through bill of lading from shipping point to Galveston is issued by the initial carrier, the railroad, with a through export rate, in accordance with joint tariffs of the rail and water carriers on file with the Interstate Commerce Commission. Loaded by the railroad into a box car and transported to a Mississippi River point, the movement is affreightment, regardless of ownership of the box car; it makes no difference whether the car be owned by the carrier supplying the

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[20] 49 U.S.C. preceding Sections 1, 301, 901 and 1001, reproduced in the Appendix, *infra* p. 55.

[21] 49 U.S.C. 1(4), reproduced in the Appendix *infra* p. 56.

[22] 49 U.S.C. 316(c), reproduced in the Appendix *infra* p. 60.

[23] 49 U.S.C. 905(b), reproduced in the Appendix infra p. 62.

locomotive and the right of way or whether the box car be owned by another line of railroad. At the River point the grain is discharged into a barge for transportation south to New Orleans by Valley. Under the ruling of the Court of Appeals whether that movement be affreightment or towage depends upon whether or not Valley owns the barge. Assuming Valley does own the barge, the movement is one of affreightment, but when the barge reaches New Orleans, which is the southern terminus of Valley's certificated operation, and is delivered to an on-carrier for transportation through the Intracoastal Waterway to Galveston, the movement then becomes towage under the test laid down by the Court of Appeals, because the on-carrier does not own the barge. If, on the other hand, the cargo fortuitously be loaded at the River point into a barge owned by the canal carrier, then Valley's movement instead of being carriage is towage, and when Valley delivers the barge with the grain laden thereon to the canal carrier, which owns the barge, the movement is immediately converted from towage to carriage.

Section 20(11) of Part I of the Interstate Commerce Act[24] with respect to liability of initial and delivering carriers for loss of and damage to shipments contains a proviso that "if the loss, damage, or injury occurs while the property is in the custody of a carrier by water, the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water * * * ". Certainly in enacting this provision Congress did not contemplate that the liability of the water carrier,

[24] 49 U.S.C. 20 (11), the pertinent portion of which is reproduced in the Appendix *infra* p. 58.

whether the initial, intermediate or delivering carrier, would be that of a tower whereby the water carrier would be deprived of the benefit of Section 3 of the Harter Act, thereby enlarging the liability of the rail carrier which participated in the through movement.

It will be amply apparent to Your Honors what utter confusion and chaos would result in the application of the test established by the Court of Appeals—confusion in the issuance of bills of lading, confusion in the tariffs, and confusion in the insurances which the barge lines will have to carry, depending, purely fortuitously, on the ownership of the available barge.

The Federal Courts outside the Fifth Circuit have not had the same difficulty in dealing with the transportation of cargoes on barges not owned by the carrier. These courts have uniformly held, following *Sacramento Navigation Company v. Salz*, *supra*, that where the purpose of the movement is actually to secure transportation of the cargo, the movement is not towage, but affreightment. The United States Circuit Court of Appeals for the Second Circuit specifically rejected the test of ownership of the barge in the well considered case of *In Re O'Donnell* (C.C.A. 2, 1928) 26 F. 2d 334. There was involved there the transportation of cargo on a barge towed by a tug of different ownership, with the respective owners of the tug and the barge sharing the earnings of the voyage. The Court held, citing *Sacramento Navigation Company v. Salz*, that the movement of the cargo was affreightment and not towage and that the tug owner and the tug were entitled to the benefit of the exoneration of Section 3 of the Harter Act for cargo loss. Not only did the Second Circuit reject the test of common ownership of the tug and barge, but also held that a partnership *stricti juris* between the owner of the tug and the barge

to accomplish the transportation of the cargo was not necessary to constitute such transportation affreightment subject to Section 3 of the Harter Act.

Two District Courts have extended the doctrine of *Sacramento Navigation Company-Salz* as interpreted in *In Re O'Donnell, supra*, to situations where the tug and the cargo-carrying barge were not commonly owned and in which there was no question of joint venture or partnership between the respective owners of the tug and the barge. In *The Lehigh* (D.C. W.D. N.Y., 1935) 12 F. Supp. 75, the Tug LEHIGH, with barges in tow in tandem formation, anchored in an improper position in a ship channel, as a result of which a vessel collided with one of the barges in its tow. The colliding vessel was libelled by the barge owner and by the owner of cargo laden thereon, and the owner and claimant of the colliding vessel impleaded the tug and the barge whereon the cargo had been laden. The Court held the tug and the barge both solely at fault for the collision but exonerated both the tug and the barge from liability for cargo damage saying:[25]

> "As above indicated, the Ballenas [the tug] and Loretta [the barge] were brought in by petition under Admiralty Rule 56, and it is the duty of the court to settle the entire controversy. Both the Ballenas and the Loretta were seaworthy, properly manned, equipped, and supplied at the beginning of the voyage, and the collision and sinking of the Loretta was due to errors in navigation and in the management of the tug and barge. The tug and tow constitute a single carrier within the meaning of section 3, c. 105, of the Act of February 13, 1893 (46 U.S.C.A. § 192) and neither vessel can be held for loss of the cargo [*In*

[25] 12 F. Supp. 83.

re O'Donnell (C.C.A.) 26 F. 2d 334], and the suit of the Grasselli Chemical Company must be dismissed."

Again, in *The Vale Royal* (D.C.D. Md., 1943), 51 F. Supp. 412, the Court reached the same result. There a barge laden with cargo was stranded by a tug of a different ownership than the barge, and both the barge owner and the owner of cargo laden on the barge libelled the tug for their respective damages. The Court held that the stranding had occurred through the mutual fault of the tug and the barge. It held the tug liable to the barge owner for half damages to the barge, but dismissed the claim of the cargo owner for cargo damage on the ground that the tug and the barge, though not commonly owned, constituted one vessel within the meaning and intendment of the Harter Act, saying:[26]

> "Therefore, the only question remaining to be determined is whether the two vessels, the tug and the barge, constitute the 'vessel transporting merchandise or property' within Section 3 of the Harter Act, 46 U.S.C.A. § 192, that is to say, whether they are to be treated as one vessel. In *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 47 S. Ct. 368, 71 L. Ed. 663, the tug and the barge were so treated in a case where they both had the same owner. Similarly, in *In re O'Donnell*, 2 Cir., 26 F. 2d 334, the same result was reached where the tug and barges were owned by different persons but under an arrangement for sharing profits. Libellants contend that unless the *Sacramento Navigation Company* case is extended beyond what they contend are the permitted limits of that decision, the Harter Act should not be held to apply to the present case and that, therefore, recovery should be allowed against the Tug Trojan for the loss of the cargo. With this contention of libel-

[26] 51 F. Supp. 425.

lants we do not agree. We do not understand that the Supreme Court in its decision in the *Sacramento Navigation Company* case intended to draw any sharp lines as respects ownership of the two vessels. It is true, as libellants contend, in that case certain language is employed with respect to *The Murrell*, 1 Cir., 195 F. 483, and *The Coastwise*, 1 Cir., 233 F. 1, which might, *prima facie*, tend to indicate the limitation in the *Sacramento Navigation Company* case for which libellants contend. With respect to these cases, the Supreme Court said, 273 U.S. at page 331, 47 S. Ct. at page 370, 71 L. Ed. 663: 'Some things are said in those cases which, if we should not consider the differences between them and the present case, might justify this contention. The most important of these differences is that in both cases it was held that contracts of towage and not of affreightment were involved. We do not stop to inquire whether this conclusion as to the nature of the contracts was justified by the facts. It is enough that it was so held, and this holding was the basis of the decisions. Here, upon all the facts, as we have just said, the contract upon which respondent must rest is one of affreightment, the obligation of which is to carry a cargo, not to tow a vessel.'

"From this language, it is clear, first, that the Supreme Court intended to rest its distinction between the *Sacramento Navigation Company* case and these earlier decisions upon a definite difference understood to exist between the character of the contracts of carriage, namely, that the contract was one of affreightment in the *Sacramento Navigation Company* case, and one of towage in the other cases. An examination of these earlier cases indicates that such was true. Charter party agreements, not bills of lading, were the subject of interpretation. Such, it is to be noted, is not true with respect to the cargo in the present case. We have only the bill of lading, a contract of affreightment. We are satisfied that the following

> very clear and succinct language of the court in the *Sacramento Navigation Company* case must be treated as controlling in the present instance unless we are prepared, as we are not, to rest our decision upon what we believe to be an unreasonably narrow distinction (273 U.S. at pages 328, 329, 47 S. Ct. at page 369, 71 L. Ed. 663): * * * [Here the Court quotes from the opinion in *Sacramento Navigation Company v. Salz* the extract reproduced in the Appendix *infra* p. 51.]

We submit that the rule announced by the Second Circuit in *In Re O'Donnell* and by the District Courts in the cases of *The Lehigh* (D.C. W.D. N.Y., 1935), 12 F. Supp. 75, and *The Vale Royal* (D.C.D. Md., 1943) 51 F. Supp. 412, is correct and that the test of common ownership of the barge whereon the cargo is laden and the towing vessel as pronounced by the Fifth Circuit is incorrect. Further, it is to be borne in mind that the affreightments performed in those three cases were not governed by Part III of the Interstate Commerce Act. The application of that Act accentuates the error in the holding of the Fifth Circuit that the movement in this case constituted towage, for these reasons:

Holding that the interstate movement of the cargo on the Barge LA BELLE was towage and not affreightment violates the rule that an Interstate Commerce Commission certificated carrier cannot perform for a shipper any service unless that service be provided by the carrier's tariff on file with the Commission and a rate be provided therefor. Such is the specific provision of Sections 306(a) and 306(c) of Part III of the Interstate Commerce Act[27] and the jurisprudence on this subject.[28]

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[27] 49 U.S.C., Section 906, reproduced in the Appendix *infra* p. 63.

[28] *Texas & Pacific R. Co. v. American Tie & Timber Co. Ltd.*, 234 U.S. 138, 34 S. Ct. 885; *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 59 S. Ct. 612.

Valley's tariff on file with the Interstate Commerce Commission[29] did not provide for the towage of any craft other than empty barges and did not publish any rate for the towage of barges with cargo laden thereon.[30] Accordingly, the holding that the movement of the cargo and the Barge LA BELLE constituted towage would result in Valley having performed and the shipper having accepted a service not provided for in Valley's tariff on file with the Interstate Commerce Commission and an unpublished rate, which would amount to a discrimination.

James' ignorance of the provisions of carrier's tariff or the failure of the carrier to quote to the shipper the pertinent provisions of the tariff, both of which have been stressed by the shipper in the lower court, is no excuse[31] which permits either the carrier or the shipper to depart from the strict terms of the tariff, for to do so, as stated, would be for the carrier to grant a discrimination and the shipper to accept one, both reprobated by law. The contractors' equipment which constituted the cargo of the LA BELLE was a commodity the transportation of which was regulated by Part III of the

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[29] Freight Tariff 25-C, I.C.C. 101 sent to this Court in the original

[30] The only towage rates published by Valley and then in effect are to be found in its Freight Tariff 25-C, I.C.C. 101, Items 5000, 5010, 5020, 5030 and 5060 (p. 96), which provided rates for the towage of empty barges only between certain places, with these rates to be computed on the basis of the top surface area of the barge and the barge's mean draft. See page 96 of the tariff Exhibit Valley 7, sent to this Court in the original.

[31] *Atchison, Topeka & Santa Fe Railway Company v. C. E. Robinson*, 233 U.S. 173, 34 S. Ct. 556; *Southern Railway Company v. W. E. Prescott*, 240 U.S. 632, 36 S. Ct. 469; *Pittsburgh, C. C. & St. L. Ry. Co. v. Fink*, 250 U.S. 577, 40 S. Ct. 27; *New York Cent. & H. R. R. Co. v. York & Whitney Co.*, 256 U.S. 406, 41 S. Ct. 509; *Chesapeake & O. Ry. Co. v. Martin, et al.*, 283 U.S. 209, 51 S. Ct. 453; *Lowden, et al v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 59 S. Ct. 612; *Strawberry Growers' Selling Co., Inc. v. American Ry. Express Co.* (5 C.C.A.) 31 F. 2d 947; *Socony-Vacuum Oil Co. v. Smith* (C.A. 5, 1950) 179 F. 2d 672, 675; *Union Pac. R. Co. v. Gaede* (C.A. 10, 1940) 110 F. 2d 931, 933; *West India Oil Co. v. Compania Transatlantica de Barcelona* (C.C.A. 2, 1924) 5 F. 2d 425, 430; *Martug Towing Co. v. Eastern Transp. Co.* (C.A. 3, 1945) 152 F. 2d 924, 929.

Interstate Commerce Act. Whether or not James was cognizant thereof, it would have been illegal for James to have procured the transportation of this equipment by a carrier other than one properly certificated by the Interstate Commerce Commission under Part III of the Interstate Commerce Act. James could not even have chartered or leased a tug to tow the laden barge except from a carrier certificated to perform this service by the Interstate Commerce Commission.[32]

Section 11(a) of Valley's bill of lading[33] specifically provides that the carrier shall be entitled to the benefit of Section 3 of the Harter Act. However, the Court of Appeals appears to have been influenced to some extent by the fact that the bill of lading for this shipment of contractors' equipment was not issued until after the barge had sunk. Interstate carriers by water are required by law to issue bills of lading.[34] We submit that the fact that the bill of lading for this shipment was not issued until after the barge had sunk is wholly immaterial and that it would have been immaterial if the bill of lading had never been issued. Notwithstanding the fact that a bill of lading is not actually issued, both the carrier and the shipper are bound by the terms of the bill of lading prescribed for the shipment by the Interstate Commerce Commission; in this case the bill of lading in the

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[32] Section 302(e) of Part III of the Interstate Commerce Act, reproduced in the Appendix *infra* page 61, provides that the furnishing for compensation under a charter, lease or other agreement, of a vessel to a person other than a carrier subject to the Act, to be used by such person in the transportation of its own property, shall be considered to constitute as to the vessel so furnished engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the definition of "contract carrier by water" contained in sub-paragraph (e).

[33] This bill of lading sent to this Court in the original and Section 11(a) reproduced in the Appendix *infra* p. 53.

[34] Section 4 of the Harter Act, reproduced in the Appendix *infra* p. 55.

form provided in Mississippi Valley Barge Line Company's Freight Tariff 25-C, I.C.C. 101.[35]

The District Judge relied heavily on *Cornell Steamboat Co. v. United States*, 321 U.S. 634, 64 S. Ct. 768.[36] The Court of Appeals in its opinion made only bare mention of this case without any particular application.[37] We submit that *Cornell Steamboat Co.-United States* has no application to the cases at bar. All that Your Honors decided in that case was that where a towboat company held itself out to the public as ready to perform for any one the service of towing a barge interstate for one rate regardless of whether or not cargo was laden thereon, the towing company became a common carrier subject to regulation under Part III of the Interstate Commerce Act. In that case, unlike the cases at bar, the movement was admittedly towage. The question was not presented to Your Honors as to what constituted affreightment and what constituted towage, and, of course, the decision in that case does not resolve that point.

Accordingly, we submit that the Court of Appeals erred in characterizing the movement of the cargo on the Barge LA BELLE as towage rather than affreightment and as a corollary thereto erred in holding that Valley did not have the benefit of Section 3 of the Harter Act as to cargo.

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[35] 13 C.J.S., Carriers, § 123b, pp. 237-238; *New York Cent. R. Co. v. Lazarus* (C.C.A. 2, 1922) 278 F. 900; *Charles J. Webb Sons Co. v. Central R. Co. of N. J.* (D.C., S.D. N.Y., 1928) 28 F. 2d 392; *Atlantic Coast Line R. Co. v. Clinchfield Fuel Co.* (D.C. W.D. S.C., 1951) 94 F. Supp. 992; *New England Fruit & Produce Co. v. Hines*, 97 Conn. 225, 116 A. 243; *Western Maryland Ry. Co. v. Cross*, 96 W. Va. 666, 123 S.E. 572; *Chesapeake & O. Ry. Co. v. Glogora Coal Co.*, 113 W. Va. 796, 169 S.E. 471, certiorari denied, 290 U.S. 658, 54 S. Ct. 73.

[36] R. 372-373.

[37] R. 396, wherein the Court of Appeals states that the shippers rely on that case as destroying or greatly limiting the effect of Your Honors' decision in *Sacramento Navigation Company v. Salz*, but without expressing any opinion on the validity of that argument.

II.

Not only is Valley entitled to the benefit of Section 3 of the Harter Act for the loss of and damage to the cargo laden on the Barge LA BELLE, but in addition Valley is entitled as to both the barge and cargo to the benefit of the limitations on its liability contained in its tariff filed with the Interstate Commerce Commission.[38] Both the District Court and the Court of Appeals have declared these tariff provisions invalid on the basis of Your Honors' decision in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629. We submit that this is a wholly unwarranted application of the doctrine of the *Bisso* case.

The *Bisso* case lacked four of the essential ingredients found in this case. First, in the *Bisso* case the movement was admittedly towage and not affreightment. Second, Bisso was a private tower and not one subject to the jurisdiction of the Interstate Commerce Commission. Third, the agreement between Bisso and the shipper was a private contract of towage and not one made pursuant to a tariff on file with and promulgated by the Interstate Commerce Commission. Fourth—and though last, certainly not least, for it is an important ingredient—in the *Bisso* case the owner of the craft towed was not afforded a choice of rates, such as in this case.

As Mr. M .C. Pearson, Mississippi Valley Barge Line Company's Traffic Manager, who published Valley's Freight Tariff 25-C, I.C.C. 101[39] testified,[40] in making Valley's rates he takes into consideration the costs, which includes all expenses plus a fair profit and the cost of

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[38] Reproduced in Appendix *infra* p. 65 *ff.*

[39] R. 167.

[40] R. 172.

insurance where Valley has any liability for loss of or damage to cargo. The pertinent portion of his testimony was given in answer to the question whether the question of insurance or liability enters into the rate structure. He replied:

> "Yes, it does, as will be observed from the Exhibit-8, I believe it was. There is a difference between the A, B, and C rates. The B rates are lower than the A rates because of the difference in liability assumed by this company, which takes into consideration that the shipper-customer must purchase insurance if he wants it insured. Likewise, the 'C' rates which apply in customers' barges, takes into consideration that the customer supplies the barge in which we transport the freight, and, of course, also furnishes his own insurance."

There is no contrary testimony, yet the decision of the Court of Appeals in these cases produces the incongruous result that for the lowest of the three rates the shipper has been afforded the protection against loss of or damage to cargo provided only by the highest of the three rates, the "A" rate, because by its express terms the intermediate, or "B" rate, which is indisputably an affreightment rate, affords carriage subject to the provisions of Section 3 of the Harter Act. Likewise the decision of the Court of Appeals in these cases produces the incongruous result that the carrier finds itself saddled with a liability which it assumed only under an "A" rate—its highest rate, and a liability which it has not insured because its rate did not include anything with which to purchase insurance.

Accordingly, we submit that the *Bisso* case is not authority for holding invalid the liability clauses em-

bodied in Valley's I.C.C. Tariff. Furthermore, we submit that in any event the courts are without primary jurisdiction to consider the validity of those provisions, that jurisdiction being confined solely to the Interstate Commerce Commission, in accordance with the doctrine announced by Your Honors in *U. S. v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S. Ct. 161,[41] wherein Your Honors quite pertinently remarked:

> "A tariff is not an abstraction. It embodies an analysis of the costs incurred in the transportation of a certain article and a decision as to how much should, therefore, be charged for the carriage of that article in order to produce a fair and reasonable return. Complex and technical cost-allocation and accounting problems must be solved in setting the tariff initially."

Here Valley has published three rates—an "A" rate, a "B" rate and a "C" rate. To fix the level of each of these rates requires an analysis of the costs incurred in the transportation of the article, the cost of furnishing equipment, the cost of the carrier's providing insurance to cover loss of and damage to cargo, all of which must be determined to produce for the carrier a fair and reasonable return for the transportation of the cargo.

The liability assumed by the carrier for loss of and damage to cargo is one of the principal items which entered into each of these three rates: under the highest, or "A" rate, the carrier assumes the greatest liability; under the "B" rate, a lesser liability; and under the "C" rate, which is the lowest rate, no liability. Obviously that rate does not contain anything for cargo insurance taken out by the carrier.

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[41] To the same effect see *Texas & P. R. Co. v. American Tie & Timber Co. Ltd.*, 234 U.S. 138, 34 S. Ct. 885.

We submit that the Courts should not undertake to pass on the validity of the liability features of the tariff and that if any question of the validity of those rates is involved, that is a matter which should be referred to the Interstate Commerce Commission.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writs of certiorari should be granted and that the judgments of the Court of Appeals should be reversed.

Respectfully submitted,

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OPINION OF
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(May 3, 1957.)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

HUTCHESON, Chief Judge: These two appeals from judgments in related actions, arising out of the sinking of the LaBelle and consolidated for trial, present for our decision two primary questions: one, whether the district judge correctly held [1] that the sinking was due to the negligence and fault of the appellant; the other, if so, whether the appellant was entitled to invoke the exoneration afforded by Section 3 of the Harter Act and the defensive clauses of the bill of lading.

The answer to the first question depends merely upon an appraisement of the facts in evidence. The answer to the second question depends upon whether the transportation involved was carriage or towage, and whether if it was carriage, Valley was entitled under the circumstances to invoke Section 3 of the Harter Act. The overall answers to both questions depend upon whether the district judge was correct in his determination of fact and of law as to Valley's liability in connection with the sinking of the barge.

This is the origin of the two actions. In December of 1954, T. L. James & Co., Inc., hereafter called "James", engaged in the general contracting and construction business with offices at Houston, Texas, and Kenner, Louisiana, and Mississippi Valley Barge Line Co., hereafter

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[1] *Mississippi Valley Barge Line vs. T. L. James & Co.*, 144 F. Supp. 662.

called "Valley", a common carrier by water, which holds an Interstate Commerce Commission certificate,[2] entered into an agreement that Valley would transport the barge LaBelle, supplied and loaded by James with a bulldozer and other miscellaneous contractors' equipment, from New Orleans, La. to Cheatham Dam, Tennessee, for an agreed upon charge, and would return the barge to New Orleans empty without charge. Enroute the barge careened and dumped its load and then sank in the Mississippi River, thereby precipitating this litigation.

It was initiated by a suit at law filed by Valley against James for the freight money and the Federal transportation tax due thereon for transporting the cargo of contractor's equipment pursuant to a provision in Valley's tariff on file with the Interstate Commerce Commission for the collection and payment of the transportation charges, notwithstanding the fact that the cargo was lost en route.

Subsequently, James, as bareboat charterer of the Barge LaBelle, sued in admiralty for its damages allegedly incurred because of the sinking of the barge, and James, together with Brown & Root, Inc. doing business under the name of Louisiana Bridge Company, hereinaf-

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[2] The pertinent provisions of which are:

"It is hereby certified, That public convenience and necessity require operation by the Mississippi Valley Barge Line Company as a common carrier, in interstate or foreign commerce, by nonself-propelled vessels with the *use of separate towing vessels in the transportation of commodities generally and by towing vessels in the performance of general towage, between ports and points along* * * * [Here follows a lengthy description of waterways, including the route from New Orleans to Cheatham Dam, Tennessee, over the several waterways involved].

"It is ordered, That the Mississippi Valley Barge Line Company be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or hereafter may be, attached to the exercise of such authority from this Commission." (emphasis supplied)

ter called "Shippers"), alleging that they were the owners of the contractors' equipment laden on the Barge LaBelle, joined in this admiralty action claiming the damages allegedly sustained by them as such cargo owners resulting from the sinking of the barge. Valley filed a 56th Rule Petition against James alleging that James had warranted that the Barge LaBelle was seaworthy and the cargo properly stowed thereon and demanded that in the event Valley be held liable for loss of or damage to the Barge LaBelle or its cargo, due to unseaworthiness of the barge or improper storage of cargo thereon, Valley be awarded a decree for a similar amount over against James.

In the suit by James and Shippers against Valley for their damages, the District Court entered an interlocutory decree holding that the transportation of the contractors' equipment on the Barge LaBelle constituted towage, and not carriage, and that Valley was liable for damages for negligent towage. The district judge dismissed Valley's 56th Rule Petition against James for alleged breach of warranty of the seaworthiness of the Barge LaBelle and the propriety of the stowage of the cargo thereon. In the suit by Valley against James for its freight money, the district judge held that the question had become moot by reason of his holding that Valley was at fault for negligent towage, since permitting it to recover its freight charges and the transportation tax thereon would simply increase the Shippers' damages. Accordingly, he dismissed Valley's suit against James.

Appealing from these decrees in Docket Nos. 16469 and 16470 of this court, Valley is here thus presenting, under six specifications of error [3] the two prime questions

[3] "1. The court erred in holding that the transportation contract between T. L. James & Co., Inc. and Mississippi Valley Barge Line Company was a contract of towage and not a contract of carriage.

(Continued)

with their corollaries:

> "The principal question presented is whether contract for the transportation by Valley of the contractors' equipment laden by the Shippers on board its barge LaBelle was carriage or towage. While corollaries to this principal question are:
>
> "(1) If the movement was carriage and the defense of the exoneration of the carrier afforded by Section 3 of the Harter Act is available, then was there any failure in care and custody of cargo which would render the carrier liable for damage thereto?
>
> "(2) If the transportation of the contractors' equipment constituted towage, was there any negligence on the part of the tower which renders it liable for damage to cargo?
>
> "The second question involved, which necessarily arises if your Honors determine that the transportation of the cargo was carriage, is the status of the movement of the Barge LaBelle. Was it carriage or towage, and what is Valley's liability, if any, for the sinking of the barge?"

In support of its contention that the transportation of LaBelle with its cargo in tow of a tug is carriage and

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[3] (Continued)

"2. The court erred in holding that the movement of the cargo of contractors' equipment loaded aboard the Barge LaBelle was towage and not common carriage.

"3. The court erred in failing to give effect to Sec. 3 of the Harter Act and failing to exonerate Mississippi Valley Barge Line Company.

"4. The court erred in failing to give effect to the tariffs of Mississippi Valley Barge Line Company and to the terms and conditions of the bill of lading issued and delivered to the shipper, T. L. James & Co., Inc.

"5. Alternatively, if the movement was towage, then the court erred in finding negligence on the part of Mississippi Valley Barge Line Company in the performance of such towage."

While in Docket No. 16,470 Valley assigns as additional error:

> "The district court erred in holding that Valley was not entitled to recover its freight charges and the Federal transportation tax thereon from James."

not towage, appellant plants itself firmly on *Sacramento Navigation Co. vs. Salz*, 273 U.S. 326, a case where, unlike here, the carrier was the owner and operator of both barge and tug. There the Supreme Court, reversing the opinion of the Ninth Circuit, 3 Federal(2) 759, and saying: "Towage service is the employment of one vessel to expedite the voyage of another", went on to say: "Here, while there was towage service, the contract actually made with respondent was not to tow a vessel but to transport goods and plainly that contract was the contract of affreightment."

Based on this decision and arguing that the line of demarcation between carriage and towage is definite and unmistakable, appellant urges upon us that, in disregarding the Sacramento case as controlling and supporting his opinion by citing *Cornell Steamboat Co. v. United States*, 312 U.S. 634, the district judge erroneously rejected an opinion which is controlling on its facts and law, on the basis of an opinion which is without pertinence to the question dealt with here, whether the contract was one of towage or one of carriage.

Realizing the pinch of the argument that in the Sacramento case both barge and tug were owned by the carrier, whereas in this case the towed vessel was not owned by it, appellant seeks to avoid the force of the argument based upon this fact by pointing out that in performing inland water carriage of cargo, a shipper may supply an instrumentality used in the carriage, and, of course, a barge is such an instrumentality, and cites and relies on In Re: O'Donnell, 26 F (2) [*sic*], where the court applied the doctrine of the Sacramento case to a case in which, while there was no common ownership of the tug and barge, the tug owner and the barge owner were sharing

expenses and profits, and, if not actually partners, were participating in a joint venture.

On the question whether there was negligence in the handling of the barge, as the district court held, appellant argues vigorously and long that there was no negligence, and that irrespective of the terms of Valley's tariff, Valley is not liable.

Recognizing that both carriers and towers which tow interstate are subject to regulation under Part III of the Interstate Commerce Act, *Cornell Steamboat Co. v. United States, supra*, and that all common carriers, whether engaged in the carriage of cargoes, are required to file with the commission their tariffs and to include therein any rules or regulations which in anywise change, affect or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the purchasers, shipper, or consignee, appellant points to the fact that Valley did file its tariff and that it contained all the rates, rules, and regulations applicable to freight transported by Valley and consisted of A. B. & C. rates. As a part of this tariff, appellant points to the provision applicable where barges are furnished for transportation, that under "C" rates, which it claims was the rate under which this shipment moved, the customer warrants that barges are seaworthy and properly equipped, and that the shipment is properly stowed therein. In addition, it points to a provision of the tariff outlawed in the Bisso case,[4] a case of towage, in effect that the towage will be performed solely at the risk of the tow and its cargo, including the risk of negligence of the towing craft, its master, pilot, officers and crew, and of the contractor and its agents, servants, employees and representatives, all of whom in respect to the towage shall become and be the

[4] *Bisso v. Inland Waterways Corp.*, 349 U.S. 85.

agents and servants of the tow and its owners. So pointing, it seeks to found upon the fact that this provision is in a tariff a claim that it is not subject to the holding in the Bisso case.

The appellees, on their part, standing firmly by the decision of the district judge, urge upon us that it was correct in all respects and that the decree should be affirmed throughout. Taking issue with the appellant as to the effect of the Cornell case, they argue that, though that was a litigation originating before the Interstate Commerce Commission, 250 I.C.C. 301, continuing through the decision of the three judge court, *Cornell Steamboat Co. v. United States*, 53 F. Supp. 349, and concluding with what it calls the landmark opinion in *Cornell Steamboat Co. v. United States*, 312 U.S. 634, whatever force and effect the Sacramento case had, has been destroyed or greatly limited by this decision.

Citing petition of Reliance Co., 89 F. Supp. 272, holding that the existence of a published tariff did not serve to transform a private carriage into a public carriage, they seek to strike down all weight attached by appellant to its published tariff. Pointing to the basic finding of the district judge, "This litigation presents * * * an attempt to apply the law of common carriage to a contract of towage and thus avoid the public policy restrictions against release from liability from negligence clauses in towage contracts", appellees cite other recent district court cases, each holding that a contract such as the one here, which was claimed to be one of carriage, was in fact one of towage.

Finally, pointing to the facts: that the opinion in the Sacramento case turned entirely upon the fact that both tow and tug were owned by the carrier; that the Supreme

Court held that the contract was not one for towage; that in the O'Donnell case, *supra*, the court in effect held that the owner of the tug and the owner of the barge had made a joint contract of carriage with the shipper; appellees point out that the facts[5] here are entirely different.

Because the district judge, in his opinion, fully and adequately set out the facts bearing on the question of negligence in handling the LaBelle, and we agree fully with his statements of the facts and his findings on the issue of negligence, we will content ourselves with saying so and that unless appellant is entitled to be relieved from liability under the Harter Act or under some defensive clause of its bill of lading, the judgment must be affirmed. Addressing ourselves, therefore, first to the claim that the clause, exempting it from liability for negligence and in effect purporting to make its own employees the agents of the barge owner, exonerated appellant it is sufficient to say that the validity of this clause has been definitely and conclusively settled against it

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[5] Mr. Walters for James testified: "I contacted Mississippi Valley from Houston requesting them to give me a price for the movement of the barge from New Orleans to Ashland City or Cheatham Locks, Tennessee, and received a minimum cargo rate for 300 tons which was less than the weight of the cargo." Nothing was said about affreightment. Only towage was discussed. Nothing was said about a bill of lading or its contents. The bill of lading was in fact received several weeks after the cargo was lost.

While Mr. Thompson for Valley did say that he mentioned the word "tariff" in the telephone conversation, he admitted that none of the tariff provisions were quoted or discussed, and he did not deny that the subject of the conversation was the movement of the barge.

The confirmatory letter of Dec. 8th, from Thompson to Walters began, "This will confirm recent conversations concerning your barge LaBelle and subsequent empties which you desire to move from New Orleans to Cheatham Dam, Tennessee and return."

The telegram of the same day read, "Will move barge LaBelle Dec. 11, to Cheatham, rate $6.30 per net ton plus 15%. Minimum weight 300 tons."

Walters replied by wire, "Consider this formal acceptance your offer of barge movement."

It was only after the barge was lost that the bill of lading was issued and the present contentions with regard to the contract were put forward.

in the Bisso case, and that, as pointed out in the opinion of the district judge below and in the briefs of the appellees here, the fact that this illegal clause is embodied in a tariff cannot make it legal.

Upon the crucial question, whether the contract was and was intended to be one of towage rather than of affreightment, we are of the clear opinion that no other reasonable view can be taken of the evidence than that the district court took. The fact that both the oral agreement and its written *confirmations provided for moving the barge;* the fact that nothing was said at the time of the contract about the matters now so strongly urged, *that the agreement was not one of towage but one of affreightment;* and the fact that the bill of lading was not issued until sometime after the loss; not only tends strongly we think to support but also to compel the view that the parties were contracting not for affreightment but for a towage service and that the district judge was right in so holding.

While, therefore, we are inclined to the view that the undisputed facts do not bring Valley within the essential requirements of Sec. 3, "*If the owner of any vessel* transporting merchandise or property to and from any port in the United States, *shall exercise due diligence to make the vessel* in all respects seaworthy * * *." (emphasis supplied), in that Valley was not the owner of the vessel LaBelle in which the merchandise was loaded and Valley did nothing whatever to make the vessel LaBelle seaworthy, and it would be in our opinion a perversion of the statute, which was designed to encourage and require owners to make their vessels seaworthy, to permit Valley to invoke the section in connection with a carriage where it neither owned, nor had part in conditioning, the vessel in respect of which the exoneration

is claimed, because of our conclusion that the contract was for towage, we do not express a firm opinion on this point.

Finally, as to the alternative holding of the district judge, that if the contract was for affreightment the LaBelle was itself the cargo, and the provision in the Harter Act which prevents the application of the section, that the lack of diligence which is excused is not with respect to the care of the cargo, defeats its application here, while at first blush the idea seems fanciful, it seems no more fanciful than the general claim of the appellant that in this kind of case it can escape the consequences of its negligence in connection with the towing of the LaBelle by claiming the protection of the tariff and of the Harter Act. Since, however, we have concluded to affirm the judgment on the ground that the movement was one of towage, it will not become necessary to, and we refrain from expressing a definite opinion on this point.

The judgment was right. It is AFFIRMED.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(September 2, 1956)

WRIGHT, District Judge:

This litigation presents a valiant but unsuccessful attempt to apply the law of common carriage to a contract of towage and thus avoid the public policy restrictions against release from liability for negligence clauses in towage contracts.[1] For the reasons hereinafter an-

[1] See *Bisso v. Inland Waterways Corp.*, 349 U.S. 85.

nounced, this attempt fails, not only because certification as a common carrier under the Interstate Commerce Act [2] does not render the law with reference to towage inapplicable, but also because the loss here was caused by improvident care of cargo, which, even under the Harter Act, is excepted from exoneration.[3]

On December 11, 1954 the barge LaBelle, in tow of the M/V L. Wade Childress and loaded with a valuable cargo of contractors' equipment, dumped its cargo and sank in the Mississippi River approximately opposite the Plaquemine Locks. At the time of the casualty the Childress was owned and operated by the Mississippi Valley Barge Line Company. The LaBelle was under bareboat charter to T. L. James & Co., Inc. and Brown & Root, Inc., d/b/a Louisiana Bridge Company, and the cargo of contractors' equipment was owned by T. L. James & Co., Inc.

The LaBelle was a converted ferryboat with a flat steel deck. It was 150′ in length by 35′ in breadth by 5′6″ in depth. When originally built in 1922 it had a beam of 28′. On conversion, a 3′ wide sponson, or blister, which ran the full depth of the hull to 40′ from each end of the barge, was added to each side. Holes approximately 30″ square and approximately 30″ from the bottom plating were cut in the side plating of the original barge, leading into the wing compartments adjacent to the sponson. Ten-inch pipes had been run through the three fore and aft bulkheads about 1′ up from the bottom of the barge. When removed in conversion, these 10″ openings had not been closed. The five athwartship bulkheads of the original hull were watertight up to a few inches of the deck of the barge. The three fore and aft

[2] 49 U.S.C. §901 *et seq.*
[3] 46 U.S.C. §190.

bulkheads were not watertight. Water moved freely from one side of the vessel to the other within the athwartship bulkheads.

On December 4, 1954, one week before the casualty in suit, the LaBelle departed New Orleans in tow for Krotz Springs, Louisiana, where on December 6, 1954 it was loaded with the contractors' equipment.[4] The loading was effected by grounding the forward end of the barge on the bank of the Atchafalaya River and working the equipment aboard. On December 6, 1954, the LaBelle departed Krotz Springs in tow of a pushing tug and arrived without incident at New Orleans on December 8, 1954, where custody of the barge in its loaded condition was accepted by Mississippi Valley. At the time, the LaBelle had a freeboard of approximately 2′ port and starboard, 3′ at the bow and 4′ at the stern. She was in all respects trim and apparently seaworthy.

The LaBelle departed New Orleans December 10, 1954 at about 7:00 P.M. northbound up the Mississippi River for Cheatham Dam, Tennessee. It was incorporated as the lead barge in the starboard string in a tow of 18 barges with the towboat, L. Wade Childress, owned and operated by Mississippi Valley, pushing. About 2:00

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[4] The equipment consisted of:

1—54B Diesel Bucyrus Erie Dragline;

1—803 Diesel Koehring Dragline complete with one 2¼ cy. Hendricks dragbucket;

1—D8 Caterpillar tractor equipped with cable controlled Bulldozer;

1—Ford pickup (privately owned) loaded with employees' tool boxes;

1—8′ x 10′ Tool house loaded with miscellaneous rigging and rope supplies;

10—New 5′ x 26′ crane mats;

1—200 amp. welding machine on skids;

1—Ford pickup loaded with one 200 amp. Lincoln welding machine and one cutting outfit.

on the morning of December 11th, the mate, Lowder, discovered water in the port and starboard wing compartments or holds of the barge, forward of amidship. Assisted by a deck hand, he placed a 3" electric pump into the starboard hold through the hatch opening and started pumping operations. At 5:00 A.M., although the pump had gained considerably on the water, there was still about 1' of water in the hold. He allowed the pump to continue running and notified the second mate, who relieved him. Lowder testified that though the pump was placed in the starboard wing compartment, the port wing compartment was being drained by it as well.

At 6:00 A.M. the second mate found that the holds had been pumped dry and stopped the pump. The pump was not started again until 11:45 A.M. when the master on the bridge saw that the bow of the LaBelle was settling in the water. He instructed the mate to inspect the barge and, on being relieved by the pilot, proceeded to the barge himself. On arriving at the barge, he decided that the barge was so full of water that it should be beached. While the mate was attempting to install pumps through the hatchways which were accessible, the master ordered the barge "topped around", or pivoted around by letting go all lines except the stern lines on the starboard side, so that the barge could be towed high end forward to the beach on the east side of the river at Melody Point. Within a few minutes, however, the LaBelle dumped its cargo over its bow, broke loose from its moorings and sank, bow end first, into the Mississippi River. Subsequently, the LaBelle was raised. When the barge was inspected on dry dock, an L-shaped aperture in the bottom of the sponson, 2' from the starboard side and 51' from the stern, was discovered. The L-shaped aperture was approximately 30" in size with the two legs

of the L approximately 4" in width.

This litigation was instituted by the filing of a civil action by the carrier to recover its transportation charges against T. L. James & Co., Inc. James answered denying liability and counter-claiming for $75,000 covering the loss of the contractors' equipment. Subsequently, James and Brown & Root, doing business as Louisiana Bridge Company, and James, individually, filed a libel in admiralty in which James reiterated the $75,000 claim for loss of the contractors' equipment and James and Brown & Root together, under the name of the Louisiana Bridge Company, additionally claimed $7500 covering the cost of salvaging and repairing the barge LaBelle. The carrier answered this libel denying liability and filing an interpleader under Admiralty Rule 56 against James claiming reimbursement from James of any amount which it might be required to pay because of any unseaworthiness of the barge, LaBelle, or any improper stowage of the cargo, on the theory that James had warranted to the carrier that the barge was seaworthy and that its cargo was properly loaded and stowed.

The carrier contends that the loss in suit was not caused by its negligence or the negligence of its employees, that water entering the LaBelle through the hole in the blister caused it to lose its buoyancy, and that the blister was holed during loading before the barge was delivered to the carrier's custody. In the alternative, it argues that, being a certificated common carrier under the Interstate Commerce Act, shippers are bound by its tariff filed with the Commission and incorporated in the bill of lading, which tariff exonerates the carrier from liability for any negligence on the part of itself or its employees. In any event, the carrier claims the protec-

tion of Section 3 of the Harter Act[5] which releases a carrier from liability for errors in navigation or management of the vessel provided the owner thereof exercises due diligence to make the vessel seaworthy. The carrier also maintains that, under its tariff, it is entitled to payment of the freight in spite of the fact the cargo was never delivered.

T. L. James & Co. and the Louisiana Bridge Company contend that involved here is a simple contract of towage and that no tariff filed with the Commission, or bill of lading issued pursuant thereto, can relieve the carrier for loss occasioned by the negligence of its employees. They also contend that they are not liable for the freight because it was not earned, because the provision in the bill of lading stating that freight shall become earned and payable at the beginning of the voyage is not enforceable as against public policy, and for the further reason that the bill of lading did not accompany the shipment, was not contemplated by the parties, and, in fact, was not issued until several weeks after the loss.

The history of the fight of the common carrier to relieve itself of the stringent liability imposed by the

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[5] Section 3 of the Harter Act, 46 U.S.C. §192, reads:

"If the owner of any vessel transporting merchandise or property to and from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

common law is well known. The history of the fight to exempt towage from common carrier liability is likewise well known. Unsuccessful in their attempt to obtain judicial approval for release from liability clauses in their carriage contracts,[6] the carriers persuaded the Congress to pass the Harter Act in 1893. With reference to towage contracts, the Supreme Court in 1955, having previously exempted the tower from carrier liability,[7] after backing and filling for many years,[8] finally and definitively held that release from liability for negligence clauses in towage contracts are illegal as against public policy. *Bisso v. Inland Waterways Corp., supra.* Adjusting its cap to fit the change in circumstance, Mississippi Valley maintains that the contract of towage in suit is a contract of common carriage after all, and that as such it is entitled to the protection of Section 3 of the Harter Act[9] as well as the release from liability provisions of its tariff filed with the Commission pursuant to the Interstate Commerce Act.[10]

The carrier's contention is in the teeth of the opinion of the Supreme Court in *Cornell Steamboat Co. v. United States*, 321 U.S. 634. In deciding that persons engaged in the business of towage were subject to regulation as common carriers, the three-judge district court held that "By labeling persons such as plaintiff 'common carriers' * * * they do not become such for all purposes" and that

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[6] *Liverpool and Great Western Steam Company v. Phenix Insurance Company*, 129 U.S. 397, 438; *Railroad Company v. Lockwood*, 84 U.S. (17 Wall.) 357.

[7] *Stevens v. The White City*, 285 U.S. 195.

[8] *Compania de Navegacion Interior, S. A. v. Fireman's Fund Ins. Co.*, 277 U.S. 66; *The Steamer Syracuse*, 79 U.S. (12 Wall.) 167. See also *Sun Oil Co. v. Dalzell Towing Co., Inc.*, 287 U.S. 291.

[9] 46 U.S.C. §192.

[10] 49 U.S.C. §901 *et seq.*

Section 320(d)[11] of the Interstate Commerce Act shows that Congress "had in mind the difference between the question of liability and that of regulation." 53 F. Supp. 349, 353. The Supreme Court, in affirming the district court, again referred to Section 320(d) of the Act and stated at Page 637, "The Act * * * is designed, not to determine the legal status of vessels for all purposes, but to provide for regulation of the rates and services of competing interstate water carriers * * *." A study of the Cornell Steamboat litigation through the Commission,[12] the district court, and the Supreme Court leaves no doubt that while a carrier engaged in towage may be required to be certificated under the Act, when that common carrier enters into a contract of towage, that contract is bound, as to liability, not by the law with reference to common carriage, but by the law with reference to towage.

The carrier cites numerous authorities[13] holding that both the carrier and the shipper are bound by the tariff filed with the Commission. These cases, however, refer to rate and related provisions of the tariff. None of them holds that an illegal provision in the tariff is enforceable. Certainly the inclusion of otherwise illegal release clauses in a tariff cannot make such clauses less illegal or more enforceable.

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[11] §320(d) of the Interstate Commerce Act, 49 U.S.C. §920(d) reads:

> "Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this chapter."

[12] 250 I.C.C. 301.

[13] *Lowden et al v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516; *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209; *New York Cent. & H. R. R. Co. v. York & Whitney Co.*, 256 U.S. 406; *Pittsburgh, C., C. & St. L. Ry. Co. v. Fink*, 250 U.S. 577; *Southern Railway Co. v. W. E. Prescott*, 240 U.S. 632; *Atchison, Topeka & Santa Fe Ry. Co. v. C. E. Robinson*, 233 U.S. 173.

The carrier also argues, citing authorities,[14] that only the Interstate Commerce Commission has jurisdiction to inquire into the reasonableness of any provision of the tariff, and therefore this court is without jurisdiction in the premises. Here, however, no question of reasonableness is presented. The question presented is the validity of the release clause in suit. And the Supreme Court has held all release from negligence clauses in towage contracts illegal and unenforceable as against public policy. *Bisso v. Inland Waterways Corp., supra.*

The release from liability clauses relating to towage contracts and incorporated in the carrier's tariff are, therefore, unavailing to the carrier under Bisso, *supra*, and Cornell Steamship, *supra.*[15] So, also, are the provisions of the Harter Act.[16] Assuming the Harter Act is applicable, the carrier would nevertheless be responsible for the loss. The loss here was a direct result of the failure of the carrier properly to care for the cargo in suit. For such negligence, it may not be relieved from liability. See *The Germanic*, 196 U.S. 589; 46 U.S.C. § 190. The cargo here, assuming this is a carriage contract, was the barge itself as well as its contents, and the loss resulted from the carrier's negligent failure properly to tend the barge.

Irrespective of how or when the blister on the barge

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[14] *United States v. Interstate Commerce Commission*, 337 U.S. 426; *Terminal R. Ass'n. of St. Louis v. United States*, 266 U.S. 17; *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456; *Director General of Railroads v. Viscose Co.*, 254 U.S. 498; *Northern Pac. Ry. Co. v. Solum*, 247 U.S. 477; *Loomis v. Lehigh Valley R. Co.*, 240 U.S. 43; *Texas & Pac. R. Co. v. American Tie & Timber Co., Ltd.*, 234 U.S. 138; *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184; *Simpson v. Shepard*, 230 U.S. 352; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U.S. 247; *Robinson v. Baltimore & Ohio R. Co.*, 222 U.S. 506; *Aron v. Pennsylvania R. Co.*, 2 Cir., 80 F. 2d 100.

[15] See also *Petition of Reliance Marine Transp. & Const. Corp.*, 89 F. Supp. 272; 1950 A.M.C. 125.

[16] The Harter Act, if applicable, would itself make null and void the release clauses in the tariff in so far as they sought to relieve against negligent care of cargo. 46 U.S.C. §190.

was ruptured, the fact remains that water in the hold, forward of the rupture in the blister, was discovered and pumped out the early morning of the day of the loss. Thereafter, instead of standing by the barge and inspecting the hold at regular intervals, water was not again discovered in the hold until the barge itself was noticed by the captain from the wheelhouse to be down by the head. Inspection at this time revealed that water was then in the hold in such quantity that a decision was made immediately to beach the barge. In an attempt to beach the barge after topping it around, the barge dumped its cargo into the river and sank. Allowing the barge to become so full of water that it was down by the head and in danger of sinking, particularly after being put on notice that the barge was making a controllable amount of water, is negligence of the grossest kind. *Curtis Bay Towing Co. v. Southern Lighterage Corp.*, 4 Cir., 200 F. 2d 33; *F. E. Grauwiller Transp. Co. v. Exner Sand & Gravel Corp.*, 2 Cir., 162 F. 2d 90; *Henry Du Bois Sons Co. v. Pennsylvania R. Co.*, 2 Cir., 47 F. 2d 172. It was the direct and proximate cause of the loss in suit.

Carrier's expert's gratuitous speculation that the hole was punched in the blister during loading at Krotz Springs will not bear analysis. The loading was completed December 6th, after which the barge was delivered to Coyle at New Orleans at 4:00 A.M., December 8th, being towed loaded downriver from Krotz Springs. Inspection by carrier personnel at New Orleans indicated that the LaBelle, as loaded, was in satisfactory condition for towage upstream to Cheatham Dam, Tennessee. Water was first noticed in a forward hold of the vessel on the early morning of December 11th and the hold was pumped dry in a few hours. The LaBelle sank at noon the same day. On these facts, a finding of seaworthiness

of the LaBelle at the time of its delivery to Coyle could easily be supported. The fact, however, that the LaBelle, prior to her loss, was making a controllable amount of water which the carrier negligently failed to control makes the finding of seaworthiness at time of delivery to the carrier's custody unnecessary. Assuming unseaworthiness, the proximate cause of the loss was, not unseaworthiness, but negligent failure to control the water in the holds. *Curtis Bay Towing Co. v. Southern Lighterage Corp, supra; F. E. Grauwiller Transp. Co. v. Exner Sand & Gravel Corp., supra; Henry Du Bois Sons Co. v. Pennsylvania R. Co., supra.*

The carrier's suggestion that water shipped through the ruptured blister caused the barge suddenly to go down by the head and sink is unacceptable. The rupture in the blister was 51′ forward of the stern of the 150′ vessel. The hatches, port and starboard, through which the mate discovered water in the hold and pumped it out, were forward of amidship. Water may have been able to find its way from the blister to the body of the barge itself through the 2′ x 30″ holes in the skin of the vessel, and hence through three 10″ holes, one in each of the three longitudinal bulkheads, across the width of the vessel.[17] But before that water could move forward, it had to rise almost to the deck of the barge in order to overcome the watertight athwartship bulkheads. Obviously, if the holds forward of amidship were kept dry by pumping, as they apparently could have been, no water would have reached the necessary height therein to pass over the watertight bulkhead into the next hold forward. Unless the water did so, the vessel would not

[17] Carrier's expert testified that, with the exception of the three 10″ holes, the longitudinal bulkheads were "more or less" watertight. The proof shows, however, that when the mate, Fowder, pumped out the hold forward of amidship on the starboard side, it drained the corresponding hold on the port side as well.

have become down by the head and in danger of sinking. In other words, if the crew of the Childress had kept the water out of the holds by proper use of the pumps in the hatches which were accessible, sufficient water would not have been shifted forward to cause the vessel's bow to dive.

Finding the carrier responsible for the loss renders moot its claim for freight. Holding T. L. James & Co. for the freight would only increase its damage collectible from the carrier.

Decree for libellants in the Admiralty action, for respondent in the impleader, and for defendant in the Civil Action.

New Orleans, Louisiana, September 25, 1956.

s/ J. Skelly Wright
United States District Judge

JUDGMENT OF THE COURT OF APPEALS

Extract from the Minutes of May 3, 1957.

MISSISSIPPI VALLEY BARGE LINE COMPANY,

No. 16469. versus

T. L. JAMES & CO., INC., ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Mississippi Valley Barge Line Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

JUDGMENT OF THE COURT OF APPEALS

Extract from the Minutes of May 3, 1957.

MISSISSIPPI VALLEY BARGE LINE COMPANY,

No. 16470. versus

T. L. JAMES & CO., INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appel-

lant, Mississippi Valley Barge Line Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court:

* * * * *

EXCERPT FROM SACRAMENTO NAVIGATION COMPANY v. SALZ, 273 U.S. 326, 47 S. Ct. 368.

"The libel recites that it is 'in a cause of towage,' and in argument this is strenuously insisted upon. Towage service is the employment of one vessel to expedite the voyage of another. Here, while there was towage service, the contract actually made with respondent was not to tow a vessel, but to transport goods, and plainly that contract was a contract of affreightment. See *Bramble v. Culmer* (C.C.A.) 78 F. 497, 501; *The Nettie Quill* (D.C.) 124 F. 667, 670. Respondent's contention, however, seems to be that the shipping contract as evidenced by the bill of lading was with or for the barge alone, but that, when petitioner took the barge in tow, an implied contract of towage with respondent at once arose. This view of the matter, we think, is fallacious.

"The fact that we are dealing with vessels, which by a fiction of the law are invested with personality, does not require us to disregard the actualities of the situation, namely, that the owner of the tug towed his own barge as a necessary incident of the contract of affreightment, and that the transportation of the cargo was in fact effected by their joint operation. The bill of lading declares that the cargo was shipped *on board* the barge.

But it was to be transported, and this the barge alone was incapable of doing, since she had no power of self-movement. It results, necessarily, that it was within the contemplation of the contract that the transportation would be accomplished by combining the barge with a vessel having such power. Respondent says there was an implied contract to this effect; that is, as we understand, a distinct contract implied in fact. But a contract includes, not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made. 3 Williston on Contracts, § 1293; *Brodie v. Cardiff Corporation* [1919] A. C. 337, 358. And there is no justification here for going beyond the contract actually made to invoke the conception of an independent implied contract.

"Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract, and the use of the tug must be read into that contract as an indispensable factor in the performance of its obligations. To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would have been as futile as a contract for the use of a freight car without a locomotive. In this view, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed, the transportation of the goods was called for, not by the barge, an inert thing, but by the barge and tug, constituting together the effective instrumentality to that end."

PERTINENT PROVISIONS OF THE CERTIFICATE ISSUED TO VALLEY BY THE INTERSTATE COMMERCE COMMISSION

It is hereby certified, That public convenience and necessity require operation by the Mississippi Valley Barge Line Company as a common carrier, in interstate or foreign commerce, by nonself-propelled vessels with the use of separate towing vessels in the transportation of commodities generally and by towing vessels in the performance of general towage, between ports and points along * * * [Here follows a lengthy description of waterways, including the route from New Orleans to Cheatham Dam, Tennessee, over the several waterways involved].

It is ordered, That the Mississippi Valley Barge Line Company be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or hereafter may be, attached to the exercise of such authority from this Commission.

It is further ordered, That the holding of this third amended certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

SECTION 11(a) OF VALLEY'S BILL OF LADING

All carriage hereunder shall be performed subject to all of the terms and provisions of, and all the exemptions from and limitation of liability contained in, the

Act of Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of all other statutes of the United States according to carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith.

SECTION 3 OF THE HARTER ACT, BEING 46 U.S.C. 192, ACT OF FEBRUARY 13, 1893, c. 105, § 3, 27 Stat. 445

Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SECTION 4 OF THE HARTER ACT, BEING 46 U.S.C. 193, ACT OF FEBRUARY 13, 1893, c. 105, § 4, 27 Stat. 445

BILLS OF LADING TO BE ISSUED; CONTENTS. It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity; stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

NATIONAL TRANSPORTATION POLICY, SEPTEMBER 18, 1940, BEING 49 U.S.C., PRECEDING SECTIONS 1, 301, 901, AND 1001

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States

and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Note:—The following constitutes the first paragraph of section 500 of the Transportation Act, 1920, approved February 28, 1920, *infra:*

> "Sec. 500. [U. S. Code, title 49, § 142.] It is declared to be the policy of Congress to promote, encourage, and develop water transportation, service and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

SECTION 1 OF PART I OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 1(4), ACT OF JUNE 18, 1910, § 7, c. 309, 36 Stat. 545, AS AMENDED FEBRUARY 28, 1920, c. 91, § 400, 41 Stat. 474; SEPTEMBER 18, 1940, c. 722, TITLE I, § 2(c), 54 Stat. 899

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and

reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

SECTION 15 OF PART I OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C., SECTION 15(13), ACT OF FEBRUARY 4, 1887, c. 104, SECTION 15, 24 Stat. 384, AS ADDED JUNE 29, 1906, c. 3591, § 4, 34 Stat. 590; AS AMENDED JUNE 18, 1910, c. 309, § 12, 36 Stat. 553-554; FEBRUARY 28, 1920, c. 91, § 421, 41 Stat. 488; MARCH 4, 1927, c. 510, § 2, 44 Stat. 1447; AUGUST 9, 1935, c. 498, § 1, 49 Stat. 543; SEPTEMBER 18, 1940, c. 722, TITLE I, SECTION 10(a-d), 54 Stat. 911, 912.

If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumenality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the

same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

SECTION 20(11) OF PART I OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 20(11), ACT OF FEBRUARY 4, 1887, c. 104, PT. I, § 20, 24 Stat. 386; JUNE 29, 1906, c. 3591, § 7, 34 Stat. 593; MAR. 4, 1915, c. 176, § 1, 38 Stat. 1196; AUG. 9, 1916, c. 301, 39 Stat. 441; FEB. 28, 1920, c. 91, §§ 436-438, 41 Stat. 494; JULY 3, 1926, c. 761, 44 Stat. 835; MAR. 4, 1927, c. 510, § 3, 44 Stat. 1448; APR. 23, 1930, c. 208, 46 Stat. 251; AUG. 9, 1935, c. 498, § 1, 49 Stat. 543; SEPT. 18, 1940, c. 722, TITLE I, § 13(b), 54 Stat. 919.

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or

transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: * * *. [Omitting the provisions with regard to limitation on values of ship-

ments, notice and filing of claims, and the venue of suits for recovery of damages.]

SECTION 216 OF PART II OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 316(c), ACT OF FEBRUARY 4, 1887, c. 104, PART II, § 216, AS ADDED AUGUST 9, 1935, c. 498, 49 Stat. 558, AND AMENDED JUNE 29, 1938, c. 811, § 16, 52 Stat. 1240; SEPTEMBER 18, 1940, c. 722, TITLE I, § 22(b-d), 54 Stat. 924

Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

SECTION 225 OF PART II OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C., 324(a), ACT OF FEBRUARY 4, 1887, c. 104, PART II, § 225, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE I, § 26(a), 54 Stat. 928.

If the owner of property transported under this part directly or indirectly renders any service connected with

such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

SECTION 302(e) OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C., 902, ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 302, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 929.

The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract carrier by water". Whenever the Commission, upon its own motion or upon application of any interested

party, determines that the application of the preceding sentence to any person or class of persons is not necessary in order to effectuate the national transportation policy declared in this Act, it shall by order exempt such person or class of persons from the provisions of this part for such period of time as may be specified in such order. The Commission may by order revoke any such exemption whenever it shall find that the application of such sentence to the exempted person or class of persons is necessary in order to effectuate such national transportation policy. No such exemption shall be denied or revoked except after reasonable opportunity for hearing.

SECTION 305 OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 905(b), ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 305, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 934

It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions there-

of, which shall not unduly prefer or prejudice any of such carriers.

SECTIONS 306(a) AND 306(c) OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 906, ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 306, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 935

(a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

* * * * *

(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this part

or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: Provided, That the provisions of sections 1 (7) and 22 of part I (which relate to transportation free and at reduced rates), together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water.

SECTION 314 OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 914, ACT OF FEBRUARY 4, 1887, c. 104, PART III, SECTION 314, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, SECTION 201, 54 Stat. 945

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefore shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

SECTION 415 OF PART IV OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C., 1015, ACT OF FEBRUARY 4, 1887, c. 104, PART IV, § 415, AS ADDED MAY 16, 1942, c. 318, § 1, 56 Stat. 296

If the owner of property transported in service subject to this part directly or indirectly renders any service connected therewith, or furnishes any instrumentality used therein, the charge and the allowance therefor, to such owner, shall be published in tariffs filed in the manner provided in this part and shall be no more than is just and reasonable and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the freight forwarder or forwarders for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

PERTINENT ITEMS OF MISSISSIPPI VALLEY BARGE LINE COMPANY'S FREIGHT TARIFF 25-C, I.C.C. 101, EXHIBIT VALLEY 7, SENT TO THIS COURT IN THE ORIGINAL

[Explanatory note: This tariff consists of 117 printed pages of provisions and rates of Mississippi Valley Barge Line Company and its participating carriers (named on page 4 of the tariff), being Coyle Lines Incorporated, Dixie Carriers, Inc., Federal Barge Line, Inc., Gulf Canal Lines, Inc., and Hyer Towing Company, all of whom have published concurrences with the Interstate Commerce Commission. The cover, among other things, bears the legend "Freight Tariff 25-C (cancels Freight Tariff 25-B) naming local and joint all water commodity

rates in bargeloads and rates for transporting empty barges" between specified points. The only "towage" rates are for towing empty barges, computed on the basis of their top surface area and mean drafts, which will be found on page 96 of the tariff. The transportation rates for all commodities are published as affreightment rates, either "A", "B" or "C", the two former in barges furnished by the carriers and the "C" rate in barges furnished by the shippers. Item 680, hereinafter referred to, is the face of Valley's straight bill of lading, printed in its tariff at page 39. Item 690, hereinafter referred to, is the face of Valley's order bill of lading, printed in its tariff, page 40. Item 700, hereinafter referred to, is the back both of Valley's straight and of its order bills of lading, printed in its tariff, pages 41 and 42. Item 710, hereinafter referred to, is Valley's towing contract, printed in its tariff, page 43.]

Item 10

GENERAL APPLICATION OF RATES

(a) Except as otherwise provided, rates named herein apply f.o.b. barge at origin to f.o.b. barge at destination.

(b) All rates in this Tariff shown under columns headed by letters "A", "B" and "C", indicate application of such rates as follows:

Column "A" Rates—apply on shipments moving in barges furnished by Carrier, including full common carrier liability. (See Item 40)

Column "B" Rates—apply on shipments moving in barges furnished by Carrier, including only limited liability. (See Item 40)

Column "C" Rates—apply on shipments moving in

barges furnished by Customer, including only limited liability. (See Items 40, 490, 500 and 510)

* * * * *

Item 40

CARRIER'S LIABILITY

(a) **Column "A"** rates published in this Tariff are subject to the terms and conditions of Items 680, 690 and 700 of this Tariff, under which carriers assume liability for losses due to fire and marine risks and Acts of God, unless arising out of War or unless caused by authority of law as excepted in said items.

(b) **Columns "B" and "C"** rates published in this Tariff are subject to the terms and conditions of Items 680, 690 and 700 of this Tariff, under which carriers assume only limited liability.

* * * * *

Item 490

SHIPMENTS IN BARGES NOT SUPPLIED BY CARRIER

(a) Customer warrants that barges not owned or supplied by Carrier, loaded with shipments which Customer offers for transportation under "C" rates, are seaworthy and properly equipped and supplied and in all respects fit and suitable to be towed and that the shipment is properly stowed therein or thereon. Carrier reserves the right to refuse to accept any such barge if in its judgment the barge is unfit to be towed, and Carrier's determination of unfitness shall be conclusive. Carrier shall not be obligated to inspect barges supplied by Customer or the stowage of any shipment therein or thereon and Carrier shall not be liable for failure to

make such inspection; and such inspection, if made, shall not affect the warranties of the Customer as herein expressed.

(b) Carrier reserves the right, without liability therefor, to terminate the towage and/or tie off any barge supplied by Customer at any point should the barge become unfit to tow, and Carrier's determination of unfitness shall be conclusive. Thereafter, if Customer corrects such unfitness, Carrier will complete the towage of the barge to its original destination at the rate applicable from point of origin to such destination.

(c) Carrier will not be liable for charges and expenses of any nature that may accrue against barges supplied by Customer or shipments therein or thereon, except as otherwise may be provided herein.

Item 500

MOVEMENT OF EMPTY BARGES NOT SUPPLIED BY CARRIER IN CONNECTION WITH COLUMN "C" RATES

(a) When shipment is transported in barge furnished by Customer at Column "C" rates named herein, a return movement of the empty barge to point of origin (or some intermediate point) will be made without additional charge unless otherwise provided, if such empty barge is tendered to Carrier for return movement within one hundred eighty (180) days after delivery of the loaded barge at destination.

(b) An empty barge, which is owned or controlled by Customer, not exceeding the size of the barge used for the loaded movement may be forwarded under the provisions of this item in lieu of the barge used for the loaded movement, provided such empty barge is tendered to

carrier for movement prior to the fifth day after delivery of the loaded barge to its consigned destination.

(c) No charge will be made by Carrier for towing to point of loading an empty barge owned or controlled by Customer if such empty barge (or another barge of the same type and size) is loaded and tendered to carrier for line-haul movement to or beyond the point of origin of the empty barge within twenty (20) days after delivery to point of loading.

(d) Customer shall be entitled to only one free movement of an empty barge under (a), (b) and (c) hereof.

(e) Empty barges tendered for movement hereunder will be accepted only subject and pursuant to the provisions of the towage contract of Carrier set forth herein in Item 710.

Item 510

CARRIER'S LIABILITY FOR LOADED BARGES NOT SUPPLIED BY CARRIER IN CONNECTION WITH COLUMN "C" RATES

When cargo is transported in barges furnished by Customer, such barges will be handled only subject and pursuant to the provisions of Item 710.

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OCTOBER TERM, 1957.

No. 446

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Petitioner,

versus

T. L. JAMES & CO., INC., ET AL.,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

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Supreme Court of the United States

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ARGUMENT

May It Please the Court:

Having succeeded in blinding both the District Court and the Court of Appeals to the issues involved in this litigation and the legal principles and jurisprudence applicable thereto, the respondents are pursuing their obfuscating tactics in this Court.

In their brief in opposition to the petition for writs of certiorari, the burden of respondents' contention is that this is a factual case, limited in importance to the parties to the litigation and involving no legal issues af-

fecting the public generally, a contention which their own brief readily refutes, because therein the respondents by their admission put at rest any factual issue.

The petitioner is here urging that the respondents desired to have the cargo of contractors' equipment moved from New Orleans to Cheatham Dam, Tennessee, for the purpose of using it there, and that such movement constituted affreightment notwithstanding the fact that the respondents furnished the barge whereon the cargo was laden, pursuant to Section 314 of Part III of the Interstate Commerce Act.[1] Respondents admit that their purpose was to secure the transportation of the cargo of contractors' equipment from New Orleans to Cheatham Dam, Tennessee, and not to tow the Barge LA BELLE on a round trip from New Orleans to Cheatham Dam and return to New Orleans. They say in their brief (page 7):

> "Admittedly, Respondents desired to get the contractors equipment to Cheatham Dam so that a cement plant could be dismantled. As a means of getting this equipment to Cheatham Dam they charter[illegible]nd furnished a barge and contracted with Petitioner to move the said barge up the River."

This, say the respondents, raises only a question of fact, which the District Court and the Court of Appeals have resolved against the petitioner by their respective findings that such a movement constituted towage, but we submit that whether or not this movement constituted towage or affreightment presents a complex question of law and an interpretation of Part III of the Interstate Commerce Act which this Court has never resolved.

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[1] 49 U.S.C. 914, reproduced in the Appendix to the petition for writs of certiorari, page 64.

What the respondents are here urging is, in effect, that notwithstanding the requirements of Part III of the Interstate Commerce Act, a shipper may first charter a barge for the transportation of a commodity the transportation of which is regulated by Part III of the Interstate Commerce Act, from a barge owner, here the McDonough Construction Company, not certificated by the Interstate Commerce Commission as a "contract carrier by water" as required by Section 302(e) of Part III of the Interstate Commerce Act,[2] thereby being a party to a violation of that section of the Interstate Commerce Act, and then load on the barge this regulated cargo and contract for the transportation of the cargo by a carrier, whether certificated or not, which does not have on file with the Interstate Commerce Commission any tariff governing the movement of the cargo and prescribing any rate therefor. That is precisely the effect of the decisions of the District Court and of the Court of Appeals in this litigation. If that be correct, then Section 302(e) of Part III of the Interstate Commerce Act, *supra*, is meaningless, Sections 306(a) and 306(c) of Part III of the Interstate Commerce Act,[3] which respectively require common carriers by water to file with the Commission and print and keep open for inspection their tariffs and not to vary therefrom, become absolutely futile, and the whole of Part III of the Interstate Commerce Act, purporting to regulate the affreightment of certain commodities by water, becomes a sham. Any shipper either ignorant of the requirements of Part III of the Interstate Commerce Act or desirous of evading its requirements and securing for himself affreightment

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[2] 49 U.S.C. 902, reproduced in the Appendix to the petition for writs of certiorari, page 61.

[3] 49 U.S.C. 906, reproduced in the Appendix to the petition for writs of certiorari, page 63.

on terms and conditions and at rates not prescribed by the Interstate Commerce Commission, will then be free to charter a barge willy-nilly and to contract for such affreightment free of any of the restrictions of the Interstate Commerce Act.

This, say the respondents, is a matter in which the public has no interest. If that be a correct statement, then the public has no interest in the regulation of affreightment of commodities by water and the whole theory of the Interstate Commerce Act, that it is essentially to prevent discrimination, becomes just a solemn mockery.

Not only is the interest of the public in this question of vital importance generally, but specifically it is of even more vital importance to those large segments of the public which constitute shippers by water and which constitute the industry engaged in the carriage of cargo by water. These carriers have been and still are conducting their businesses on the theory that the transportation of cargoes on non-self-propelled barges with the use of towboats owned by them constitutes affreightment as to such cargoes, and that in performing such affreightment they have the benefit of Section 3 of the Harter Act, regardless of the ownership of the barges. Yet, say the respondents in their brief (page 11):

> "Obviously, it was not the intention of Congress to afford the owner of a towing vessel the protection of the Act when the barge being towed was furnished and/or was actually being physically maintained by its own owner or some other third party and there is no basis whatsoever, considering the history and application of the Act, for supposing that Congress had any intention of

providing for the exercise of due diligence by a carrier in making seaworthy vessels or equipment owned or operated by others."

Obvious to whom? Certainly not to the water carriers. On the contrary they urge that it was obvious that Congress did intend to extend to them the protection of Section 3 of the Harter Act regardless of the ownership of the dumb barge on which the cargo may be loaded. How else could two or more carriers participate in the affreightment of a cargo moving on a through bill of lading over a route which requires the participation of more than one carrier? Obviously, the barge will be owned by one of the participating carriers, so that in order for any other participating carrier to engage in affreightment the cargo would have to be shifted to a barge of the ownership of the next participating carrier as each carrier reaches the end of its certificated route.

The jurisdiction of the courts to declare invalid provisions of the tariff on file with and published by the Interstate Commerce Commission is dealt with in full in the petition, and the respondents's objections to our contentions require no further comments here.

CONCLUSION

In conclusion, we respectfully submit that the matters here presented for determination are not questions of fact but on the contrary are complex questions of law in which the public generally, and particularly the shippers by water and carriers engaged in the transportation of commodities by water with the use of non-self-propelled barges and towboats, have a vital interest; that these questions have not yet been considered by Your

Honors; and accordingly that Your Honors should grant the writs of certiorari prayed for herein and put at rest these questions.

Respectfully submitted,

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Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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SUPREME COURT OF THE UNITED STATES.

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On Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

MAY IT PLEASE THE COURT:

I. OPINIONS BELOW.

The opinions below are reported as set forth on Page 1 of the Petition and are printed in the Appendix thereof, Page 29, *et seq.*

II. JURISDICTION.

Jurisdictional requisites are correctly set forth in the Petition but Respondents submit there is no basis for granting Writs of Certiorari.

III. STATUTES INVOLVED.

Petitioner has properly listed the statutes upon which it relies, but as the Courts below correctly held, since the marine movement in question herein was one of towage in the traditional sense under *Cornell Steamboat Co. v. United States*, 321 U.S. 634, 64 S. Ct. 768 (1944), the rules of towage and not common carriage govern the liability of the common carrier and, accordingly, the statutes listed have no pertinence or application and this Court's decision in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629 (1955), is controlling.

IV. ARGUMENT.

A. Petitioner is really asking this Court to reconsider facts determined by the Courts below and this Court, quite properly, is not ordinarily concerned with the re-examination of factual findings.

Respondents submit that the real question presented is whether this Court should re-examine the factual findings of the Courts below. The District Court for the Eastern District of Louisiana, New Orleans Division, after hearing the witnesses in Open Court, and the Court of Appeals for the Fifth Circuit, after hearing oral argument and studying the record, both held that, on the basis of the testimony, the marine movement involved in this case was really a movement of towage and that, insofar as liability was concerned, the rules of towage controlled. Applying the rules of towage, liability was determined to exist and Respondents were allowed to recover their damages. The Petitioner, in essence, claims merely that

in holding the movement of the Barge LA BELLE constituted towage and not common carriage, the Courts below committed grevious error. It is obvicus from a reading of the Petition that this alleged factual error is the real basis for the request for Writs. For reasons which will be discussed at a later place in this brief, Respondents strongly urge that the Courts below correctly concluded the parties were contracting for towage service and not affreightment but, at any rate, certainly such a finding is not under ordinary circumstances a proper subject for review by this Court as this Court is concerned with legal questions of importance which are apt to reoccur, and not with the re-examination of specific factual findings.

B. Since this case turned on particular facts, its decision is limited in importance to the parties to the litigation and no legal issues involved affect the public generally.

This Court, taking cognizance of the pertinent language of the Interstate Commerce Act (Transportation Act of 1940), 49 U.S.C. Sec. 920(d), itself, held in *Cornell Steamboat Co. v. United States, supra*, that, although certificated companies engaged in what was towage were subject to regulation under the Act, it was not the intent of Congress to disturb the rules governing the liability of vessels or their owners for loss or damage to vessels in tow or cargo laden thereon. Accordingly, it was necessary for the Courts below to determine first whether the movement involved herein was one of towage or common carriage. If the movement were one of carriage,

the laws of common carriage were applicable and the Harter Act, 46 U.S.C. Sec. 190 et seq., was pertinent. If, however, the movement was towage, under the *Cornell* case, *supra*, and the cases which followed it, the rules of towage were applicable insofar as liability was concerned, even though Petitioner was a certificated common carrier. Therefore, the Courts below merely had to decide whether the movement was towage or carriage and then apply the applicable rules of liability to the facts. After hearing the witnesses in Open Court, the District Judge decided that the parties had actually made a contract for towage and not a contract of affreightment. The Court of Appeals for the Fifth Circuit concluded, without a dissent, that the factual findings of the District Court were correct and stated that the evidence actually "compelled the view that the parties were contracting not for affreightment but for a towage service . . ." Once that finding was made both Courts below made the further factual finding that the Petitioner was negligent in towing Respondents' barge and cargo. On the basis of these factual findings they had no alternative other than to ignore the various exculpatory clauses in the Petitioner's Tariff and to apply the established Admiralty doctrine laid down in the *Bisso* case, *supra*, and hold Petitioner, as tower, liable to Respondents, as owners of the property towed. The fact that if the movement was towage the law was properly applied has not been even disputed by Petitioner. Certainly, this case was decided on its own facts and no legal issues justifying the granting of Writs are involved.

C. The finding of the Courts below that the movement herein was towage is clearly substantiated by the evidence.

Even if this Court were inclined to re-examine factual findings, which it is not normally inclined to do, this litigation is not a proper case for review because it is so manifestly clear that the movement of the LA BELLE was actually one of towage. Cargo interests loaded and furnished the barge and contracted with the Petitioner merely to move the said Barge. Such a movement has been for years by custom and definition a towage movement. The testimony shows, as the Court of Appeals for the Fifth Circuit pointed out in its opinion, that both the oral agreement and the written confirmations provided solely for moving the barge itself. That Court further pointed out that Respondents' representative did not expect that a bill of lading would be issued and the bill of lading which was ultimately issued was not received until two weeks after the casualty. Actually, even the timely issuance of a bill of lading could not have made that which was really towage carriage for liability purposes. *Petition of Reliance Marine Transp. & Const. Corp.*, 89 F. Supp. 272, (D.C. Conn, 1950), 206 F. 2d. 240 (C.C.A. 2, 1953).

Petitioner maintains that Respondents' contractors equipment was a commodity, the transportation of which is regulated by Part III of the Interstate Commerce Act, *supra*, and that the Respondents could not have chartered a tug to tow the LA BELLE laden with this equipment except from a carrier certificated by the Interstate Com-

merce Commission. Even if true, this fact is not significant. Again, Attorneys for Petitioner ignore the *Cornell* litigation. Respondents do not deny that they were dealing with a certificated common carrier, but show under the *Cornell* decision, insofar as liability is concerned, the rules of towage apply because the movement was actually one of towage.

D. Petitioner's contention that the holding below is in conflict with the decision of this Court in Sacramento Navigation Company v. Salz and in conflict with decisions in the Second and Fourth Circuits does not bear analysis.

Respondents are of the opinion that the decision below is not in conflict with any decision of this Court or in conflict with any decision of any of the Courts of Appeal. Petitioner relies heavily on this Court's decision in the case of *Sacramento Navigation Company v. Salz*, 273 U.S. 326, 47 S. Ct. 368 (1926). However, in the *Salz* case, Sacramento Navigation Company was a carrier which owned and operated both the tug and the carrying barge and contracted to transport barley in sacks on its own barge. Such a contract has traditionally been a contract of affreightment. In this case, the Respondents furnished the barge and merely contracted with the Petitioner to move it with its cargo from New Orleans, Louisiana, to Cheatham Dam, Tennessee. As pointed out earlier, such a contract has always been by definition towage. Accordingly, the *Salz* case, instead of being analogous to the instant situation, actually pinpoints one of the principal differences between towage and carriage. At any rate,

it is not authority for Petitioner's argument that the ownership of the vessel whereon cargo is laden is wholly immaterial to the determination of whether a movement be towage or carriage.

Petitioner places great stress on the language of the *Salz* case to the effect that where a contract made by the shipper is a contract to transport goods and not a contract to move a vessel such a contract is a contract of affreightment. Petitioner urges that Respondents' motive was to have cargo transported and not to have a vessel moved and, accordingly, the movement in question falls under the doctrine of the *Salz* case. Admittedly, Respondents desired to get the contractors equipment to Cheatham Dam so that a cement plant could be dismantled. As a means of getting this equipment to Cheatham Dam they chartered and furnished a barge and contracted with Petitioner to move the said barge up the River. However, such a movement is, and has always been, towage, and if such a movement is not towage, there can be no towage. Since barges are built and used merely as instrumentalities to carry cargo, if Petitioner's position is sound, all marine movements by barge must necessarily be carriage. Of course, Petitioner ignores completely the fact that the Courts below specifically found the parties had entered into a contract for the movement of the loaded barge itself and not into a contract to transport cargo.

Judge Hutcheson, Chief Judge for the Fifth Circuit, in a unanimous opinion, said:

> "Upon the crucial question, whether the contract was and was intended to be one of towage rather than of affreightment, we are of the clear opinion that no other reasonable view can be taken of the evidence than that the district court took."

Petitioner also claims that the decision below is in conflict with the jurisprudence in the Second and Fourth Circuits and cites *In Re: O'Donnell*, 26 F. 2d. 334 (C.C.A. 2, 1928); *THE LEHIGH*, 12 F. Supp. 75 (W.D.N.Y. 1935); *THE VALE ROYAL*, 51 F. Supp. 412 (D.C. Md. 1943). However, all of these cases are clearly distinguishable. In the case of *In Re: O'Donnell*, *supra*, although there was no common ownership of the tug and barge, the tug owner and the barge owner were sharing profits and expenses and, if not actually partners, were engaged in a joint venture. The Court really held that the owner of the tug and the owner of the barge had made a joint contract of carriage with the shipper for the benefit of both pursuant to which they contributed to the venture their interests in the tug and barge, respectively. The contract with the shipper was clearly a contract to transport cargo and not, as here, a contract to move a barge.

In *THE LEHIGH*, *supra*, a District Court sitting in the Second Circuit merely followed the *O'Donnell* case and did not discuss the question of the relationship of the barge and tug with reference to the contract of carriage of the cargo upon the barge. In any event, the fact that

a District Court in the Second Circuit decided on an entirely different set of facts that a certain marine movement was carriage does not constitute such a conflict with the decision here of the Court of Appeals for the Fifth Circuit as to warrant the granting of Writs of Certiorari by this Court.

The third case urged as showing a conflict between the Circuits is that of the *V. LE ROYAL, supra.* Again we say this was a decision merely of a District Court based on an entirely different set of facts. The language of the decision reflects that the Court considered the importance of discussing and finding the fact that the barge, although separately owned from the tug, was under time charter to the tug owner and as to the cargo, the tug owner, in effect, was the owner *pro hac vice* of the barge, and the contract to carry the cargo was made for the benefit of the tug owner.

E. Gross inequities would result if this Court were to grant Writs or the holding of the Courts below were disturbed.

Gross inequities would result if this movement were held to be one of common carriage for liability purposes and the Harter Act were held to be applicable. This is true because, to hold that the rules of liability of common carriage apply, would have the effect of rendering the relatively recent decision of this Court in *Bisso v. Inland Waterways, supra,* declaring release towage agreements void as contrary to public policy, virtually meaningless in most instances where the owner of the negligent towing vessel was certificated by the Interstate Com-

merce Commission as a common carrier. The *Bisso* decision, *supra*, would be rendered virtually meaningless because the operators of vessels acting as common carriers could not be made answerable for damages resulting from the faulty management or navigation of their vessels as responsibility for such errors is specifically excluded by Section 3 of the Harter Act, 46 U.S.C. Sec. 192, if due diligence has been exercised to make the carrying vessel seaworthy. Quite obviously, most casualties in which towboats are involved are occasioned by errors in navigation and if it were held that the rules of common carriage and not towage apply where towboats operated by certificated companies are moving barges owned or furnished by cargo interests, the incredible result would be that vessels operating as common carriers would be in an infinitely better position from a liability standpoint than vessels operating under the rules of towage, although traditionally common carriers with good reason have been held to a higher degree of care than ordinary towers. Of course, the Petitioner realizes that in view of the *Bisso* decision, *supra*, responsibility for negligence can now be avoided only through the Harter Act and, accordingly, as the District Court Judge pointed out, is "adjusting its cap to fit the change in circumstance." It is indeed ironic to find River Operators who have long attempted to avoid liability as common carriers by insisting they were towers, now attempting to hold themselves out as common carriers for liability purposes in the teeth of this Court's decision in the *Cornell* case, *supra*.

Further, Section 3 of the Harter Act, *supra*, requires the "owner" of the vessel transporting the merchandise

to exercise due diligence to make the said vessel seaworthy as a condition precedent to securing the exoneration from liability provided and Petitioner neither owned, managed, controlled, nor had any interest in the LA BELLE. Of course, the whole purpose of the Harter Act was, and is, to encourage shipowners to keep their vessels in a seaworthy condition and protection was given in certain instances in return for diligence in maintaining seaworthiness. Obviously, it was not the intention of Congress to afford the owner of a towing vessel the protection of the Act when the barge being towed was furnished and/or was actually being physically maintained by its own owner or some other third party and there is no basis whatsoever, considering the history and application of the Act, for supposing that Congress had any intention of providing for the exercise of due diligence by a carrier in making seaworthy vessels or equipment owned or operated by others.

F. In the alternative, even if liability herein is governed by the rules of common carriage, which is denied, nevertheless, Respondents are entitled to recover their damages in this case and there is no reason to grant Writs.

Admittedly, in the case of domestic common carriage, if a carrier complies with the provisions of the Harter Act, it need not specifically contract for the exemption from negligence provided in certain instances by the Act. Accordingly, if Petitioner's towboat CHILDRESS, for purposes of liability, was acting as a domestic common carrier by water, the Harter Act has application.

However, Respondents submit, but entirely in the alternative, that even if the movement herein be considered one of common carriage for liability purposes, on the basis of the facts and the nature of the loss, Respondents are, nevertheless, entitled to recover their damages. This is so because Section 3 of the Harter Act, *supra*, exempts the carrier from responsibility only where the loss results from errors in management or navigation of the vessel and does not exempt the carrier from responsibility where the loss is occasioned as a result of failure to properly care for the cargo. In some cases it is very difficult to draw the line between errors in management or navigation of the vessel and failure to properly care for cargo, but in this case there is no such problem. As both Courts below found, the loss herein was occasioned by failure to properly care for the LA BELLE and, of course, under Petitioner's theory of the case the LA BELLE itself must be classified as cargo. As the District Judge concluded, "the cargo here, assuming this is a cargo contract, was the barge itself as well as its contents."

G. Petitioner cannot rely on the release towage agreement or any of the other clauses in its Tariff which exculpate it from the consequences of its own negligence and the Courts and not the Interstate Commerce Commission, as Petitioner contends, are the proper forums for determining whether release from negligence clauses are void as contrary to public policy.

Throughout this litigation Petitioner has maintained that the release agreement and all of the other exculpatory clauses and terms of its Tariff must be pre-

sumed to be reasonable and enforceable unless and until the Interstate Commerce Commission declares any one or more of them invalid and unenforceable. Neither the District Court nor the Court of Appeals for the Fifth Circuit were impressed at all with this contention and the District Judge appropriately explained in his opinion that "the inclusion of otherwise illegal release clauses in a tariff cannot make such clauses less illegal or more enforceable." Counsel for Respondents submit the Courts below are manifestly correct and that neither any such tariff nor the approval thereof by the Interstate Commerce Commission can be used or enforced in such a way as to vitiate the doctrine laid down by this Court in *Bisso v. Inland Waterways Corporation, supra.*

Petitioner cites *United States v. Western Pacific Railroad Company,* 352 U.S. 59, 77 S. Ct. 161 (1956), as authority for its contention that the Interstate Commerce Commission and not the Courts must pass on the reasonableness of such clauses of its Tariff and states that the decision below is in conflict with this Court's decision in that case. We must point out that the contention of the Petitioner that the Courts are powerless to declare illegal exculpatory clauses in Interstate Commerce Commission approved tariffs, and the litigant must first resort to the Interstate Commerce Commission is answered by the words of this Court itself in the decision relied upon by Petitioner for in *United States v. Western Pacific Railroad Company, supra,* this Court was very careful to limit the effect of its decision by saying, at page 69:

> "By no means do we imply that matters of tariff construction are never cognizable in the courts."

Further, in connection with the construction of another tariff this Court clearly held in the case of *St. Louis, Iron Mountain & Southern Railway Co. v. Hasty & Sons*, 255 U.S. 252, 41 S. Ct. 269 (1921), at page 256:

> "This matter is so free from doubt that there is no occasion to apply to the commission for a construction, as insisted by appellant . . ."

In *Great Northern Railway Company v. Merchants Elevator Company*, 259 U.S. 285, 42 S. Ct. 477 (1922), this Court likewise stated in a case concerning the construction of a Tariff that (page 294):

> "Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed as to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore unnecessary."

We hardly need call the Court's attention to the fact that in *United States v. Western Pacific Railroad Company, supra*, the question involved concerned tariff classifications and rates, while in this case there is no question of tariff classifications or rates but solely a legal question as to the validity and construction of exculpatory clauses which the Courts are preeminently the fit tribunals to pass upon rather than the Interstate Commerce Commission. This is especially true since the Interstate Commerce Act (Transportation Act of 1940),

supra, under the terms of which Petitioner is certificated, specifically provides that it was not the intent of Congress to change the legal liabilities of vessels for damages.

V. CONCLUSION.

Respondents respectfully submit that the opinions of this Court and recent expressions of many of the individual Justices thereof show clearly that this is the very type of case which this Court should not be expected to review since the opinions of the two Courts below were based entirely upon concurrent findings of fact and of negligence. Justices Frankfurter and Harlan in *Rogers v. Missouri P. R.R. Co.*, 352 U.S. 521, decided on February 25, 1957, in separate opinions, gave emphatic legal and practical reasons why this Court should not grant certiorari to review evidence, particularly in negligence cases, even in those arising under federal statutes. See also Per Curiam opinion of this Court in *McCarthy v. Bruner*, 323 U.S. 673, 65 S. Ct., 126 (1944).

Chief Justice Taft earlier in 1923 expressed the unanimous views of this Court on this subject in no uncertain terms in the case of *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 43 S. Ct. 422 (1923) as follows at page 393:

> ". . .it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and

embarrassing conflict of opinion and authority between the circuit courts of appeal."

See also *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 44 S. Ct. 164 (1924).

In conclusion, Respondents submit that this case was decided entirely on its own facts in the Courts below; that the decision of the Court of Appeals for the Fifth Circuit does not conflict with any decisions of any other Courts of Appeal or conflict with any decisions of this Court; that the Courts below have not decided any important question of Federal law which should be settled by this Court and that, accordingly, there is no basis for granting Writs of Certiorari.

Respectfully submitted,

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